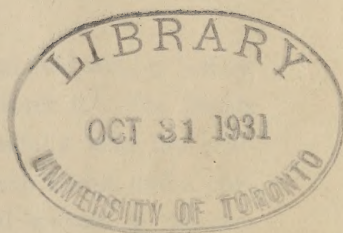
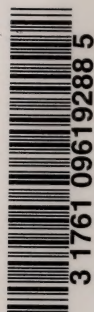


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American Federation of Labor

# "Yellow Dog" Contract

## Menace to American Liberties



THE AMERICAN FEDERATION OF LABOR  
WASHINGTON, D. C.

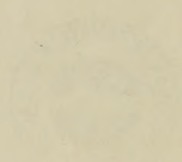
WILLIAM GREEN, President

FRANK MORRISON, Secretary

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## FOREWORD

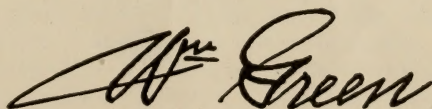
The Senate debates recurring on the confirmation of the recent nominations to the United States Supreme Court has focused attention on two themes of judicial process: the legislative attitude that looks for justice through the application of legal precedents, and the other which regards justice as a living force applying principles of human freedom to specific conditions of life and work.

Members of the Senate, as well as citizens generally, appreciate the great power and leadership that is vested in the Supreme Court and recognize that if our courts develop more discriminating principles of justice, there must be a majority on the Supreme Court who understand what constitutes justice in dealings between men and who can devine the human values involved in each decision.

In the case of the second nomination, the judge had held valid a "yellow dog" contract and had upheld an injunction to enforce it. The Senate discussion of this nomination dealt most fundamentally with the principles underlying the "yellow dog" contract from both a legal and a public point of view. Some of the most distinguished lawyers in the profession took part in the discussion.

These addresses constitute a most comprehensive presentation of Labor's opposition to "yellow dog" contracts and can serve as a source book to laymen who must deal with the problems involved. To put the information in a form readily serviceable to all wage earners, these speeches have been republished in this pamphlet.

We hope the pamphlet will enable labor representatives to present the case against "yellow dog" contracts and thus help to demonstrate the need of legislation declaring "yellow dog" contracts null and void.

A stylized handwritten signature in dark ink, appearing to read 'A. Green'. The signature is fluid and cursive, with a large initial 'A' and a long, sweeping underline.

*President, American Federation of Labor.*



*From the*

## *Parker Case Debate*

*Addresses of*

HON. WILLIAM E. BORAH  
HON. ROBERT F. WAGNER  
HON. GEORGE W. NORRIS  
HON. THOMAS J. WALSH  
HON. HIRAM W. JOHNSON  
HON. KENNETH McKELLAR  
HON. HENRIK SHIPSTEAD

*In the United States Senate, Dealing with the Individual  
or "Yellow Dog" Employment Contract*



## HON. WILLIAM E. BORAH, SENATOR FROM IDAHO

I am opposed to the confirmation of Judge Parker because I think he is committed to principles and propositions to which I am very thoroughly opposed. If these were matters which related to a single law suit, or the determination of a principle relating alone to the rights of individuals, it would be one thing. But, as I see the propositions here involved, they are fundamental, they relate to matters of grave public concern.

The nomination of Judge Parker for the Supreme Bench of the United States has brought up for consideration a contract popularly, and not without cause and not without reason, styled the "yellow dog" contract. I doubt if there is another name among lawyers or judges so well calculated to bring up for discussion and to accentuate the issues surrounding that contract as the name of Judge Parker. He is peculiarly identified with this kind of a contract.

As we proceed with the discussion we shall see why that is so. In my opinion he has gone further in sustaining the principles of that contract and in supporting and enforcing it through the powers of injunction than any other judge who has ever been called upon to deal with the matter. About that there will be a difference of opinion, but, after much study, that is the view I hold.

It ought to be understood in the beginning that no question here is raised with reference to the uses and abuses of the injunction in labor disputes, generally speaking. I presume that matter will be before us at no distant day for discussion, as there is now pending before the Committee on the Judiciary a bill dealing with that subject. But I am not concerned, nor am I to discuss, the general principles relating to the use of injunctions in labor disputes.

Neither do I wish it understood that I am complaining because an injunction issued in the Red Jacket case, so called. There were ample facts in that case to justify the issuing of an injunction to restrain violence, intimidation, threats, trespass, and so forth, and it must not be understood that I am complaining that the court issued an injunction restraining such acts upon the part of workingmen. If workingmen employ threats, intimidation, and violence, if they so conduct themselves as to imperil life and property, they are and should be subject to restraint the same as other people. In so far as that issue is involved, I have no defense for the labor organization and no criticism of the judge for restraining that class of acts.

We are not contending here that labor organizations can at any time employ threats, force, or violence, or intimidation, nor can they trespass upon the property of other people. They must keep within the law. That is not the issue which is involved in this controversy. As I said a moment ago, there were ample facts, so far as I read the record, to justify the injunction in regard to these matters. I am contending for nothing more than peaceful methods.

## PERSONAL FREEDOM IS INVOLVED

I want to say, also, that this is not a controversy between the employer and employe alone. It is not a controversy between the employer and union labor alone. Far, very far from it. It is a controversy which involves greater and more extended principles.

I understand perfectly the interest which the employer may have in this kind of a contract. It is an important interest, but it is an interest which can be measured at all times by dollars and cents.

I appreciate, too, the interest which the employe has in this kind of a contract. It is a vital interest and it is an interest which can not be measured at all times in dollars and cents. It sometimes means home and family and economic freedom. I appreciate also the interest which organized labor has in this contract, because if it were universally applied and carried to its logical conclusion, union labor would be at an end in the United States.

But over and above and beyond these interests, transcending them in importance, is the interest of the public, of the State, and of the National Government. Can there be anything of more concern to the State, to the Government, to the public generally, than that which is calculated to undermine, destroy, or build up, to render fit or unfit for citizenship, men and women who toil? Is not the public, the State, the National Government, interested in striking down, as contrary to public policy, as at war with the public welfare, all those overreaching contracts which rob those who work, of the discretion, of the liberty, of choice as to how they shall conduct themselves so long as they conduct themselves lawfully in their interests?

The question of whether workingmen may associate themselves with their friends or with their fellow laborers, whether workingmen may discuss with their fellow men or co-operate with their fellow workmen as to how they shall conduct their business, is not a matter of concern to union labor alone, it is a matter of concern to the State and to the Government which is interested in maintaining and building up the character and the physical and moral well-being of its citizens. Men may contract, but they will not contract away those rights which undermine or destroy their physical and moral well-being.

The entire controversy, so far as the law is concerned, seems to hinge upon some isolated principle extracted from the common law. To apply the principles of the common law, the barren, naked, technical rules of the common law, which sprang up three and four hundred years ago under conditions in a business world which have passed away, and to refuse to consider the conditions in the business and the labor world as they are today, is to deny working men and women the right or the benefit of advance and progress. That which may have been a sound public policy, that which may have been for the public welfare in those times and under wholly different conditions cannot bind another age and a wholly different business and labor world.

Old Doctor Johnson once said that the common law is the last result of human wisdom, applied to human experience, for the benefit of the public. If we take the business world as it is today, the labor world as it is today, labor organizations as they are now, and those things which labor must meet as they meet them now, we must apply also the principles



of common law as they should exist now and not as they existed 300 and 400 years ago. I proceed to argue this matter not alone from the standpoint of employer and employe, not alone in the interest of or against union labor, but in the interest of a sound public policy which will inure to the benefit as citizens of those who must toil.

### WHAT IS "YELLOW DOG" CONTRACT?

What is "yellow dog" contract? I shall not, if I remember myself, refer to it again by that name, but as the contract which is involved. This contract, stated in a single phrase, is an agreement between the employer and the employe that the employe will not join a union while he is an employe of the employer, that he will not associate or confer with union labor leaders or union labor members so long as he is in the employ of the employer. There are different kinds of these contracts, but that in a nutshell is the contract. However, I want to read a line or two from some contracts to illustrate the kind of a contract which employers would protect by the process of injunction. Here is one:

That during his employment said employe will not become a member of any labor union and will have no dealings, communications, or interviews with the officers, agents, or members of any labor union in relation to membership of such employe in any labor union or in relation to the employment of such employe.

This is the twentieth century in which we are now living and in which we are discussing this contract, although if we had dug the contract out of the archives of the common law about the time that it was also a crime and conspiracy for two men to meet together and discuss their wages it would seem to be more nearly akin to that time than this.

Another paragraph in another contract:

I agree during employment under this contract that I will work efficiently and diligently and will not participate in any strike nor unite with employes in concerted action to change hours, wages or working conditions.

I do not know what the conditions were in those mines which are now under discussion incidentally by reason of the contract coming from them, but we do know what the conditions have been in some mines. We do know what the conditions often are where laboring men have to work. These contracts not only go to the extent of having the employes agree that they will not join the union, but that they will not go on strike, and they will not seek through the co-operation of their fellow workmen to change the conditions under which they shall work. That contract upon its face is reprehensible from every standpoint of justice and humanity.

I only read these that we may know the kind of contract which is here involved. Let us take an illustration, Mr. President. Suppose a workman is out of employment. He approaches the office window of an employer and says, "I want work." The employer says to him, "I will give you work. I have the work for you to do. I will pay you the wage. But before you can go to work for me you must agree that you will not join any union while you are in my employment, and that you will not talk with members of a union or discuss the matter with them," and goes so far as I have just read and says, "You are not to engage in any effort to effectuate a change in your wages or your working conditions."

I want to turn here to the famous Hitchman case to illustrate the



conditions under which these contracts are signed. It will be found in a single paragraph in that case. Reciting the facts, the court said:

About the 1st of June a self-appointed committee of employes called upon the plaintiff's president, stated in substance that they could not remain longer on strike, because they were not receiving benefits from the union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run non-union, and the company would deal with each man individually. They assented to this and returned to work on a non-union basis.

Now, picture to yourselves the condition of hundreds and thousands of workingmen who had honestly joined a labor organization and who had gone upon strike for the purpose of increasing their wages, as they have a perfect right to do. Heaven only knows what would be the condition of the workingman if he had not gone on strikes in the past. The funds of the organization have been exhausted and they are no longer able to pay the workingmen or keep them in food or clothing or shelter. Therefore the workingman, the funds of the organization having been exhausted, goes to the employer and says, "I want work." The employer replies in effect, "You can go without work, you can go hungry, your wife and your children may go hungry, but you can not have work until you give up your right to associate with your fellow men even to advance your interests." The very conditions and circumstances under which such a contract is signed would, to my mind, be those of duress, and we shall see when we get to the Red Jacket case that that precise proposition was presented to the court.

#### "YELLOW DOG" CONTRACT VOID

We have tried by an act of Congress to repudiate that principle, but the Supreme Court of the United States said that our action was null and void. Mr. President, that is what makes this matter so very important. They pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon all of these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Bench something of their views on these questions.

I have been discussing what we might call the technical validity of the contract, or rather I have been calling attention to it. But the important part of these cases is that in addition to the contract, they invoke the injunctive processes of the court to sustain and protect and enforce the contract, and that is the real issue in the controversy. They take this contract, signed under the conditions which it is signed, and invoke the equity power of the court to issue an injunction that no human being may discuss with him whether or not it is wrong for him to break it. I repeat, we are living in the twentieth century!

I contend that this contract is void. That may seem presumptuous in view of the fact that a majority of the Supreme Court have held otherwise. But as a justification for what I am about to say and the way I am going to say it it must be borne in mind that no unanimous court has ever sustained this contract. The contract has been passed upon always by a divided court. The Supreme Court of New York, as I understand the decision, repudiated the principle entirely. The Supreme Court of Kansas decided against the principle. The Supreme Court of Ohio



decided 4 to 3 in favor of the contract and solely on the ground that the Federal judiciary had passed upon it. Then we come to the Supreme Court of the United States and there we find a divided court whenever this question arises. It is my opinion they have divided on the validity, but there can be no doubt the court was divided on the use of the injunction to sustain the contract.

We are not discussing today a contract which is finally and definitely settled; it has not, fortunately, been finally incorporated in our system of jurisprudence. We are fighting over a contract which is yet to receive final approval or condemnation at the hands of the American judiciary, and that, in my opinion, is an important item here for consideration. If the question had been settled beyond peradventure, if it were entirely at rest, it would be a different question; but we are discussing a question which is in formation of a conclusion as a matter of law.

I repeat what I said a moment ago, that this contract is a void contract. What is the consideration for this contract? The employe approaches the employer for employment; the employer gives him employment and the employe gives his service. In addition to that, the employer says, "You must give up a very valuable right," a right which the Supreme Court of the United States has said is essential to the equality of the laboring man in his contentions with capital, a most valuable right—his right to co-operate and to join in a union with his fellow men.

What is the consideration for giving up that right? What is it the employer pays him for surrendering a vital right of personal liberty? It cannot be the wage for which the employee renders his service, for that is the going wage for that class of labor which is being performed in the community. Then, I ask, Senators, what is the consideration?

### NO MUTUALITY

There is no consideration. The employe signs the contract because he must work or go hungry. He gives up the right to associate himself with his fellow workmen because unless he does so his wife and children may go hungry.

Let me read here a paragraph from a case decided by the Supreme Court of New York. I think this is the case which the able Senator from New York (Mr. Wagner) argued. I will not read the entire decision, of course, for it is a very long one, but quote briefly from the case of Exchange Bakery & Restaurant( Inc.) vs. Rifkin (245 N. Y. Reports, 260):

After beginning work each waitress signed a paper stating that it was the understanding that she was not a member of any union, pledging herself not to join one, or, if she did, to withdraw from her employment. She further promised to make no efforts to unionize the restaurant, and says that she will attempt to adjust by individual bargaining any dispute that may arise. This paper was not a contract.. It was merely a promise based upon no consideration on the part of the plaintiff.

In other words, there was no consideration flowing from the employer for a very valuable right given up by the employe.

Again the court says:

Even had it been a valid subsisting contract, however, it should be noticed that, whatever rule we may finally adopt, there is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to extend its influences.



That is a pretty straight decision; in my opinion, it meets the issue squarely. I can not refrain from calling attention to the members of that court: Cuthbert W. Pound, Frederick E. Crane, William S. Andrews, who wrote the opinion, Irving Lehman, Henry T. Kellogg, John F. O'Brien, and Benjamin M. Cardozo, chief justice. I suppose it will be pretty generally conceded that Judge Cardozo is one of the great jurists of this day and age, if not of the century, a jurist who commands the respect of all who know him or who read his decisions. I feel, therefore, justified in standing before this body and saying that this contract is not yet embedded in our jurisprudence; that it is not yet accepted; and that we will become a party to making it a part of our judicial system if we shall put upon the Supreme Bench those who are committed to the doctrine.

Again, what is the mutuality of this contract? The employe gives up his right to join a labor union. What does the employer give up? In this particular case, the Red Jacket case, there were 12 suits filed by various individuals and corporations, joined together, making 316 complainants altogether. They agreed that they would have nothing to do with the union; that they would employ no union man. They were organized; they were non-unionists. Would they give up their right to exclude union men if a miner gave up his right to be a member of the union? Certainly not. They gave him nothing in return.

#### FREEDOM TO CONTRACT

But now we come to the question that, even if there were a consideration, such a contract, in my opinion, falls under the rule that it is contrary to public policy. Senators will recall that when the barons wrested from King John the Magna Charta, it was looked upon at the time, and is often referred to as giving the people their liberty, whereas no one beneath the barons had any protection from it. The laboring man at that time—and I am referring to this because we are soon going back to the common law for our guidance—the laboring man at that time, if he met in association with his fellow laborers to discuss wages, was subject, under law, to prosecution for criminal conspiracy. Even at the time of the American Revolution, no workingman beneath the rank of what were called second-class farmers, or shopmen, or manufacturers, were protected by the principles of Magna Charta. It was not until 1821 in this country that any judge ever questioned the justice or legality of a law which made workingmen guilty of criminal conspiracy if they joined together to better their condition or secure an increase of wages. This contract belongs to that age. It is contrary to public policy because it places the workingmen in a position of inequality, in a position where they can not protect their interests against the employers. They are surrendering a vital, personal privilege, which is not in the interest of the public to do.

The basis upon which the contract has been sustained is that of the liberty of contract. The Supreme Court has said, by a majority, that under the fifth and fourteenth amendments the right to make a contract is part of the liberty guaranteed by those amendments, and it cannot be taken away. Liberty of contract is curtailed and circumscribed, as everyone realizes, by the question of whether or not it is in accordance with sound public policy, whether it is in the interest of the public welfare,



or whether it is against it. A railroad company cannot contract to exempt itself from liability because of its negligence. Nobody would contend that a white-slave contract would be valid. There are many contracts which have been declared invalid as being against public policy, against good morals, against the welfare of the public. If the right of workingmen to be upon equality with their employers, so that they may contract in accordance with their interests, be not of public concern I can scarcely imagine anything that is. The workingmen of the Republic hold the ballot; upon their intelligence and fitness to exercise the franchise depends in large measure the success of our Government, and anything which protects the citizen and maintains his fitness as a citizen—his physical and moral welfare—cannot be other than of great concern to the entire public and to the State.

The Supreme Court has said in the Erie Railroad case, Two hundred and thirty-third United States Reports:

Liberty of making contracts is subject to conditions in the interest of the public welfare and which shall prevail, principle or condition, can not be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself.

Again, the Supreme Court in One hundred and fifty-seventh United States Reports said:

While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts as well as all individuals from some contracts.

I might cite a multitude of cases which would establish beyond question that the right of private contract ends where the public interest and public welfare begin. It might be said in another way and equally true that liberty of contract ends where individual liberty begins. The question here is: Whether it is in the interest of the public or whether it is against the public welfare and contrary to sound public policy to permit contracts which deprive the working man and woman of the liberty of choice when it comes to determining whether they shall better serve their interests by going it alone or working it together.

#### FACTS IN RED JACKET CASE

With these preliminary observations, let us consider the Red Jacket case for a moment and then consider the cases upon which the Red Jacket case is supposed to rest.

What are the facts in the Red Jacket case? There were 12 suits instituted by various owners and operators of coal mines. The plaintiffs constituted in number 316, embracing practically all the coal companies in southern West Virginia.

These companies had agreed to operate on a non-union basis; they were not to employ any man who was a union miner. They brought suit against the United Mine Workers of America, a labor organization, unincorporated, having a membership of 475,000. These companies in employing their men exacted a contract to the effect that the employees were not members of the union and would not join the union while in their employ. In other words, all these mines were closed non-union shops.

A strike had been called by the union in attempting to unionize these miners, and the suit was to enjoin the union and its officers from inter-

fering with the companies' employes by violence, threats, intimidation and so forth, or by procuring them to breach their contracts with the plaintiffs. It is the last clause in which we are interested. We do not complain of restraint against threats or intimidation.

There is no doubt that there were violence and threats in connection with the controversy, and, in that respect, the court was perfectly justified in issuing injunctions, and temporary injunctions were obtained in all the suits. In some of these cases, or suits, it appears that settlements were obtained and the suits were withdrawn; but that is immaterial here.

The district court found, among other things, that the defendants were attempting "unlawfully, maliciously, and unreasonably to induce, incite, and cause the employes of plaintiffs in said suits, respectively, to violate their said contracts of employment with said plaintiffs."

The decree entered by the district court, which was sustained, enjoined the defendants "or by doing any other act or thing that will interfere with the right of such employes and those seeking employment to work upon such terms as to them seem proper, unmolested, and from in any manner injuring or destroying the property of the plaintiffs." It also enjoined the defendants "from inciting, inducing, or persuading the employes of the plaintiffs to break their contracts of employment with the plaintiffs."

That is the clause in which we are interested. It enjoins the defendants from inciting or persuading the employes of the plaintiffs to break their contracts of employment with the plaintiff.

What was the contract? The contract was that they would not join a union while they were in the employ of the employer, and the union was enjoined from discussing reasons with the miners or persuading them in any way that it was to their interest to join the union. So far as threats, violence, and intimidation are concerned, undoubtedly there was justification, if the facts sustained the allegation, for the issuance of the injunction; but we come to the separate and distinct proposition that the members of the union were enjoined from persuading the employes of the plaintiffs from breaching their contracts, or, in other words, from joining the union.

The defendants in their assignments of error called attention to the language of the injunction, and urged—now, notice this; this is the real issue—urged—

That the injunctive decree is too broad in that it forbids peaceful persuasion, as well as violence and intimidation.

The injunctive decree, said the defendants, was too broad, in that it enjoined peaceful persuasion, peaceful discussion, peaceful communication. I want to say to the Senate that in my judgment this is the only case that can be found where the defendants have been enjoined from peacefully persuading employes to join the union. I do not understand the Hitchman case to go that far. I do not believe there is another case where, if the facts are analyzed, it will be found that the court enjoined peaceful discussion with employes as to whether or not they should join a union; but it will be noticed that that specific issue was raised. The attorneys did not complain against the injunction in so far as it restrained intimidation or violence. They contended that it was too broad in that it did not permit peaceful discussion or persuasion against the contract.



THIS IS THE ONLY CONTRACT THAT I KNOW OF IN THE HISTORY OF THE WORLD THAT IS TOO SACRED FOR DISCUSSION. THIS IS THE ONLY CONTRACT AGAINST WHICH AN INJUNCTION HAS BEEN ISSUED DENYING THE RIGHT TO DISCUSS THE QUESTION. I SAY AGAIN THAT THIS IS THE ONLY CASE, IN MY JUDGMENT, WHERE THE COURT HAS GONE THAT FAR.

#### WAS THE HITCHMAN CASE A PRECEDENT?

Before reading the decision, perhaps it would be well to call attention to what is known as the Hitchman case, because upon the Hitchman case this case is supposed to depend. That is to say, the court followed the Hitchman case.

The Hitchman case had a contract such as is here involved. The Hitchman case involved the use of an injunction to protect the contract. This is the distinction which I make:

In the Hitchman case the defendants employed deceit and misrepresentation; and it was because of the deceit and the misrepresentation that the court restrained them from persuading in that manner the employes from breaking their contract. In other words, the scheme in the Hitchman case was that the employes should join the union, keep it a secret from the employer, and that when the time came, through secrecy, that they had enough to call a strike, they were to do so. There were no such facts in this case that I have been able to discover. I am willing to concede that the Hitchman case in its original delivery restrained the employes from breaching the contract, or restrained the union from persuading them to breach the contract; but it was only when it was accompanied, in my opinion, with deceit and misrepresentation—in other words, a scheme and a plan by which the employer was to be misled. That was restrained; and the court would restrain that if there had been no contract. Such acts, such conduct, would have been subject to restraint, if they had been injurious to the employer's property, without a contract.

Now let us take the case in 257 United States which construes the Hitchman case. This is the case which Judge Parker ought to, it seems to me, have followed. It was delivered before he delivered his opinion. Judge Parker proceeds upon the theory that the Hitchman case was authority for an injunction restraining the peaceful discussion of the contract. Had it not been for the Tri-City case, which I am now going to read, I could well understand how that inference could be drawn, and why he might come to that conclusion. But he had the Tri-City case before him; and I want to read some paragraphs from it, because, in my opinion, it puts the true construction upon the Hitchman case, which makes it an authority only when there is deceit and misrepresentation upon the part of the union and the employe.

In this case it is said:

Where the members of a local labor union, though not ex-employees \* \* \* have reason to expect re-employment at a plant where wages have been reduced, interference by them and their union by peaceable persuasion and appeal to induce a strike against the lowered wages, is not malicious or without lawful excuse—

And is not subject to restraint by injunction.

Where there is no malice, where there is no deception, where there is



no deceit, where there is no fraud, peaceful persuasion is not to be restrained, seems to me to be a fair construction of this case.

The date of the case is December 5, 1921—about four or five years after the Hitchman case.

#### FACTS IN "RED JACKET" DIFFERENT

I want to refer the Senate to what the Supreme Court in this case said in regard to the Hitchman case:

The principle followed in the Hitchman case can not be invoked here. There the action was by a coal mining company of West Virginia against the officers of an international labor union and others to enjoin them from carrying out a plan to bring the employes of the complainant company and all the West Virginia mining companies into the international union. \* \* \* The plan thus projected was carried out in the case of the complainant company by the use of deception and misrepresentation with its non-union employes by seeking to induce such employes to become members of the union contrary to the express term of their contract of employment that they would not remain in complainant's employ if union men, and after enough such employes had been secretly secured, suddenly to declare a strike against complainant and to leave it in a helpless situation in which it would have to consent to be unionized. This court held that the purpose was not lawful, and that the means were not lawful, and that the defendants were thus engaged in an unlawful conspiracy. \* \* \* The unlawful and deceitful means used were quite enough to sustain the decision of the court without more. The statement of the purpose of the plan is sufficient to show the remoteness of the benefit—

And so forth.

Then they hold that the Hitchman case being confined in its effect, in their judgment, to restraint where deception and misrepresentation were involved, it was not applicable where those principles were not involved; and they were not involved in the Red Jacket case.

Further, the court said:

The Hitchman case was cited in the Duplex case, but there is nothing in the ratio decidendi of either which limits our conclusion here or which requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employes of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employes to refuse to accept such reduced wages and to quit their employment.

What does that case hold? That case holds that where a union has an interest such as maintaining wages, such as increasing its membership, it has a right peaceably to persuade people to join it, even if they are under contract such as is here involved. For while there was no contract in the Tri-City case there were in the Hitchman case, which the court was construing.

I want to read a paragraph preceding this. This language was before the judge when he wrote the opinion in the Red Jacket case:

Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employe was helpless in dealing with an employer.

When the Red Jacket case was decided, the court had before it this declaration, first, that a labor union was lawful; second, that members of it had a just right to increase its membership, and, third, that when they did so they were not acting unlawfully or maliciously, but within

their rights, and could not be enjoined from peacefully persuading other employees to become members of the union.

### RED JACKET DECISION ENJOINS PEACEFUL PERSUASION

Mr. President, the Supreme Court here held that a labor union is lawful—not only lawful but necessary—and yet the Red Jacket case holds that it is not permissible to persuade men to join a lawful organization which is necessary for their benefit or to their interest.

He was dependent—

Says the court, without a labor organization—

ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.

The Supreme Court could have denied the writ of certiorari, so far as this question was concerned, without passing upon it at all. When I get to the Red Jacket case, and undertake to analyze it, if I can, I shall show that an interpretation of the contract in the Red Jacket case was not necessary to the full determination of the case before the court, but the court went out of its way to decide that proposition, when it could have granted full relief to the mine owners and to the property without passing upon the question at all.

I read further:

The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild.

Union labor is lawful; and it may encompass a wider jurisdiction than that of its own membership, because the wage which others are paying to other employees affects their wages. Therefore, any lawful persuasion, persuasion not accompanied by threat, intimidation, deceit or misrepresentation, is lawful, says the Tri-City case, and should not be enjoined by a court of equity.

Bear in mind that when the Red Jacket case went before the circuit court of appeals, the attorney for the labor organization did not ask for a rejection of the injunction save and except as it applied to peaceable persuasion. That was the distinct assignment of error. They did not say, "You should not enjoin them from breaching the contract or persuading them from breaking the contract if it was accompanied by deceit or misrepresentation or threats or intimidation."

The attorneys for the defendant did not complain of an injunction to that extent. They said, "The injunction is too broad. You not only enjoin intimidation, threats and violence, but you enjoin peaceable persuasion." If I understand the law from reading the decision, that is precisely what the Supreme Court has decided they might do.

It is impossible to hold such persuasion and propaganda without more to be without excuse and malicious.

In other words, there must be something more than peaceable persua-



sion. Is it not quite plain in the language here? Why go back, then, to the Hitchman case, 10 years ago, and follow it, instead of following the Tri-City case? It seems to me that the judges who sat upon the bench in the Red Jacket case were anxious to find some way to sustain and maintain that contract.

The principle of the unlawfulness of maliciously enticing laborers still remains and action may be maintained therefor in proper cases, but to make it applicable to labor unions, in such a case as this, seems to be unreasonable.

The elements essential to sustain actions for persuading employes to leave an employer are, first, the malice or absence of lawful excuse—

Maliciousness, deceit, and misrepresentation.

The Supreme Court says in the Tri-City case, in effect, as I understand it, that the Hitchman case should be confined to facts which show deceit and misrepresentation, and therefore the inference of malice. That is the construction they place upon it in the Tri-City case.

### ALTERNATIVES

It is true that in the Hitchman case they had said that the interference with the contract gave rise to the inference of malice, but that matter was before the Supreme Court in the Tri-City case, and they undertook to say, as I understand the reading, that only when deceit and malice were accompanying the persuasion could a court of equity be invoked to protect the contract.

Something has been said, and rather plaintively said, to the effect that Judge Parker was bound to follow the Supreme Court of the United States; that he could not be placed in the position of overruling the Supreme Court of the United States. The inference is that he disliked to follow it, but that in obedience to the rule which lower courts always follow, I presume, of accepting the principles laid down by the Supreme Court, he felt compelled to do so.

I am going to cite a decision by another circuit court of appeals which was able, without incurring the charge that they were not following the Supreme Court, to come to what seems to me a wholly different conclusion.

This is the case of Gasaway against the Coal Corporation, coming up, I think, from the same prolific source of litigation. Without reading the opinion, let me read the syllabus:

Employers may persuade a union man, provided they do not violate his right of privacy, nor invade the rights of another, to become non-union, and union laborers may under the same conditions persuade a non-union man to become union.

\* \* \* \* \*

Preliminary injunction held erroneous, in that it deprived union laborers of the right to persuade non-union employes of plaintiff to join the union, instead of limiting the prohibition of unionization or attempted unionization of plaintiff's men to the threatened direct and immediate interfering acts shown by the bill and affidavits.

That is the true rule. If they are employing unlawful acts, threats, intimidation, trespassing upon property in their effort to persuade them to break contract, the court may restrain them from doing those things, but they might restrain them from doing those things whether there was any contract or not.

The thing I desire to get before the Senate is this, that the naked question of peaceful persuasion was specifically presented to the Circuit Court of Appeals. The attorneys for the defendants stripped their con-



tention of everything except the right to peaceably discuss this contract, and the Circuit Court of Appeals held that they would be restrained from persuading peacefully the breach of the contract, or even discussing the contract. If that is decided in any other case I have been unable to find it.

Chief Justice Taft never said there was no such thing as peaceful picketing or persuasion. What he did say was that where there was a large gathering of men near the property or upon the property of the employer, and perhaps 50 or 100 or 200 union men accompanying the man who was making the argument or picketing, it was calculated to intimidate the employees of the company, and that that was not peaceful picketing. But he did say in the same case that if the persuasion was accompanied by such peaceful means as not to indicate intimidation, annoyance, dogging, it was lawful.

I was going to say we ought to keep in mind two propositions—First, the technical validity of the contract, and, second, the conditions under which the court will restrain any discussion of peaceful persuasion to breach the contract. In the Hitchman case the majority of the court undoubtedly upheld technically the validity of the contract, but they refused to restrain a discussion of it, as I contend, unless that discussion was accompanied by deceit and misrepresentation. What I am complaining of here is not that the circuit court of appeals recognized the contract as valid, but that they went further and refused to permit it to be discussed although it was peacefully discussed and peacefully reasoned upon. The error was in the injunction decree and not in the assumption that the contract was valid. They did not really hold the contract was valid, but they assumed that it was.

#### DECISIONS MODIFYING HITCHMAN CASE

There is one feature of the Hitchman case and the Tri-City case to which I desire to call attention as it seems to me very significant, significant of the fact that the Tri-City case modified to a marked extent the supposed holding in the Hitchman case.

In the Hitchman case Justice Brandies, Justice Holmes, and Justice Clark dissented. I read a single paragraph from Justice Brandies asserting vigorous dissent. He said:

As persuasion, considered merely as a means, is clearly legal, defendants were within their rights if, and only if, their interference with the relation of plaintiff to its employees was for justifiable cause. The purpose of interfering was confessedly in order to strengthen the union, in the belief that thereby the condition of the workmen engaged in mining would be improved; the bargaining power of the individual workingman was to be strengthened by collective bargaining; and collective bargaining was to be insured by obtaining the union agreement. It should not, at this day, be doubted that to induce workmen to leave or not to enter an employment in order to advance such a purpose is justifiable when workmen are not bound by contract to remain in such employment.

In the Hitchman case there was a contract. The question was under what circumstances the union could solicit the employees of the employer to depart from the employer and join the union.

I understand the Hitchman case to have held that, notwithstanding the fact that the union member was soliciting for the purpose of increasing the membership of the union, that was not justifiable. Justice Brandeis holds that there are conditions under which it is justifiable, and in the Tri-City case those conditions are set forth, to wit, whenever the union members undertake to persuade the employee to leave his employment for

the purpose of joining the union, without deceit or misrepresentation, without threat or intimidation, but solely for the purpose of bringing a larger membership, thereby increasing the strength of the union, that it is justifiable. In the Tri-City case, Justice Brandeis and Justice Holmes agreed with the majority opinion.

I take it, therefore, that, in view of the dissenting opinion of the Hitchman case and in view of the concurrence in the Tri-City case by Justice Brandeis and Justice Holmes, there must have been a marked modification of the holding of the court in order to enable them to consent to join in the majority opinion. I think that ought to be taken into consideration when we are undertaking to arrive at what the real holding was in the Hitchman case and in the Tri-City case.

I am very frank to admit that if the Hitchman case had stood alone, without the construction placed upon it by the Tri-City case, such inference as was made by the Fourth Circuit Court of Appeals might have been justified, but 10 years elapsed between the holding in the Hitchman case and the decision in the Red Jacket case, and in those 10 years a vast amount of criticism from lawyer and layman alike had been leveled at the Hitchman case. It seems perfectly clear to me that, upon reconsideration of the principle involved in the Hitchman case, the court clearly intended to hold that labor unions were lawful, that union members had a right to solicit membership, that if that solicitation were not accompanied by threats, intimidation, or deceit it was within their right, and that they could not be restrained from such solicitation.

#### IGNORES MORE RECENT MODIFYING DECISION

Let us read the Red Jacket case briefly and analyze it. We have given some attention to the two cases upon which it is supposed to rest. The Red Jacket case is found in Eighteenth Federal Reporter, of the second series, at page 839. There is a vast amount of the case which does not concern us here. There is the question of jurisdiction, a question which was argued at greater length than any other question—that is to say, whether or not the mining of coal, although it was shipped in interstate commerce, gave jurisdiction to a Federal court to restrain the parties from interfering with interstate commerce, the contention being that it was a mere mining of coal, and, therefore, the Federal court had no jurisdiction. That question was argued at length. Also the question was involved as to whether the proper parties had been joined in the suit. That received considerable attention at the hands of the court, but it is of no concern to us here. The court then comes to this question:

With respect to the second paragraph, complaint is made that it restrains defendants "from inciting, inducing, or persuading employes of the plaintiffs to break their contract of employment with the plaintiffs."

I ask, Senators, of what did the breaking of the contract consist? What was it the court was restraining? Under the contract the employes had a perfect right to leave or quit whenever they desired to do so; they had a right to join the union whenever they desired to do so. The only thing that they might not do was to join the union while they were still in the employ of the plaintiffs in the case. However, the court restrained them from persuading the breaching of the contract.

It is very difficult for me to understand what the breach was against which the court was restraining them, in view of the fact that I find in the



record no evidence of deceit, misrepresentation, intimidation, or threat accompanying the persuasion; but the effect of the holding of the court was to say to the employes, to the union men, "You cannot discuss with each other the advisability of joining the union," and, as a matter of fact, that is the effect it had in the case. But assuming there were threats, the defendants did not complain of the injunction restraining such acts, but asked the court to modify it and permit peaceful persuasion.

"From inciting, inducing, or persuading the employes of the plaintiffs to break their contract of employment with the plaintiffs." This language—

Says the court—

is certainly not so broad as that of the decree approved by the Supreme Court in the *Hitchman Coal & Coke Co. vs. Mitchell* (245 U. S. 229).

The court in this citation wholly ignores the *Tri-City* case, which had been decided in the meantime, and which, if I can understand language, had wholly modified the *Hitchman* case and had held definitely that persuasion, if it was not accompanied by unlawful means, such as deception and threats, was permissible.

Bear in mind that the attorneys for the defendants had specifically said to the court, "We complain that your decree is too broad, not that you should not restrain intimidation and threats, but that you should not restrain peaceful persuasion." So the specific question was raised and presented to the court as to whether peaceful persuasion was permissible. In the *Tri-City* case the court had undoubtedly held that persuasion, unaccompanied by malice, indicated by some acts unlawful in themselves, was permissible. What I do not understand from the court is why the *Tri-City* case was ignored in this instance. It would be a reflection upon Judge Parker's ability as a judge should I say that he could not see any difference between the *Tri-City* case and the *Hitchman* case, and it would be an intimation that he was seeking a prior case upon which to hinge the validity of a contract and ignoring a subsequent case if I should take the other view. It is a matter of inference which every Senator must draw for himself.

#### FAILURE TO DISTINGUISH DIFFERENCES IN CONDITIONS

There were threats, there was force, there was violence, there was fighting, all of which the court had a perfect right to restrain. Anything in the nature of unlawful conduct the court undoubtedly had a right to restrain; but what the defendants' attorneys said was, "You go too far; you not only restrain those acts which are unlawful, but you restrain peaceful persuasion." That is the specific question which the attorneys for the defense raised. May I recur to the language of the assignment of error? I quote from the statement of facts found in the decision itself.

The defendants in their assignments of error call attention to the language of the injunction and urge "that the injunctive decree is too broad, in that it forbids peaceful persuasion as well as violence and intimidation."

So there is no possible chance to misunderstand the fact that the court had before it the specific proposition, stripped of all extraneous matters, that it was peaceful persuasion upon which they passed. I ask the able lawyers who sit about me where else in the decisions upon this question can they find that the court ever enjoined peaceful persuasion with reference to the breaching of a contract, if it was unaccompanied by unlawful acts, such as deceit, intimidation, and threats?



It might have been that Judge Brandeis contended that threats or intimidation did not accompany the persuasion, and, if he did, that is the precise matter which was decided in the Tri-City case, and, perhaps, that is the reason he joined with the court in the Tri-City case and refused to join with the majority in the other case. Of course, if there were threats, if there was intimidation, the court would have a right to restrain such acts, even if there were no contract.

This language is certainly not so broad as that of the decree approved by the Supreme Court in *Hitchman Coal & Coke Co. vs. Mitchell* \* \* \* which also enjoined interference with the contract by means of peaceful persuasion.

Then, quoting further from the *Red Jacket* case:

The doctrine of that case has been approved by the Supreme Court in the later cases of *American Steel Foundries vs. Tri-City Central Trades Council* \* \* \*.

I submit it would compromise the ability of Judge Parker as a judge if he thought that the Tri-City case sustained and approved the *Hitchman* case to the extent laid down in the *Red Jacket* case. The very object and purpose of the Tri-City case was to modify the holding in the *Hitchman* case.

May I, at the risk of trespassing upon the patience of the Senate, read from the Tri-City case again in connection with this statement? After the court had held that labor unions were lawful, that they were not only lawful but necessary in order to give the working men equality, they said in regard to the *Hitchman* case, speaking of it:

The plan thus projected was carried out in the case of the complainant company by the use of deception and misrepresentation with its non-union employes by seeking to induce such employes to become members of the union contrary to the express term of the contract of the employes that they would remain in the complainant's employ if union men, and after enough such employes had been secretly secured, suddenly to declare a strike against complainant and to leave it in a helpless situation in which it would have to consent to be unionized.

The court held that the purpose was not lawful—that is, the purpose was, by deception, to unionize enough men within the employ of the company secretly so that at some early morning hour they might declare a strike, and the company would be at their mercy.

That the defendants were thus engaged in an unlawful conspiracy which should be enjoined. The unlawful and deceitful means used were quite enough to sustain the decision of the court without more.

If I understand the language of the court, it meant to say that anything in the *Hitchman* case outside of holding against persuasion when accompanied by deceit and misrepresentation was obiter dicta, and that the court should not be considered as sustaining the contention that any other width or breadth of the decision should be accepted.

The statement of the purpose of the plan is sufficient to show the remoteness of the benefit ultimately to be derived by the members of the international union.

Then they say further speaking of this case:

The *Hitchman* case was cited in the *Duplex* case, but there is nothing in the ratio decidendi of either which limits our conclusion here—

Mind you, "nothing in either case which limits our conclusion here." What is our conclusion?—

or which requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employes of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employes to refuse to accept such reduced wages and to quit their employment. For this reason, we think that the restraint from persuasion included within the injunction of the district court was improper.

## AN AVAILABLE ALTERNATIVE

It seems to me that the Tri-City case would not only have justified, but it was ample authority from the Supreme Court of the United States, in its last statement, for the Circuit Court of Appeals for the Fourth Circuit to have said that people should not be permitted, through deception or misrepresentation, or threats, or intimidation, to cause employees to breach their contract. They would have been wholly within the decision in the Tri-City case. There would have been no danger of breaching the holding of the Supreme Court or coming in conflict with the holding of the Supreme Court.

The court quotes at length from the Hitchman case; not a quotation, not a line from the Tri-City case. Shall we infer that the court did not know the effect of the Tri-City case, or shall we infer that they preferred the Hitchman case in order to sustain this outrageous and unconscionable contract? Either inference is unsatisfactory in passing upon the qualifications of a man for the Supreme Bench.

I said yesterday afternoon that we were engaged in a controversy yet unsettled—that is to say, whether this kind of a contract should become permanently embodied in our jurisprudence and accepted by the people of this country as a binding contract. My own opinion is that it will pass out of existence, just as the old doctrine that the action of two men in consulting together with reference to wages was a conspiracy has passed out of existence. In my opinion, it really as a matter of reason passed out 400 years ago, when those conditions which gave rise to that situation existed. It passed out when the new condition of affairs came about. When the laboring man had to contend with immense capital, that doctrine was no longer applicable or pertinent.

As an illustration of the fact that we are in the midst of the controversy, I have in my hand a transcript of a case now in the Supreme Court of the United States. I think the case is to be argued today. Therefore it is very pertinent that I say no more about it than call attention to the issue. In that case, if I get the facts correctly from a hasty reading, a southern railroad undertook to demand of its employes that they join a union which the railroad had organized and that they refrain from joining any other union; that they should agree not to join any union except a union which had been instituted, initiated and organized by the railroad company. The employes of the railroad company brought a suit to restrain the railroad company from making any such demands or interfering in any way with the employes having their own organization. The lower court issued the injunction against the railroad company. The matter went to the circuit court of appeals. The circuit court of appeals sustained the lower court and the case is now in the Supreme Court for determination. If we are sufficiently rapid and the decision should be adverse to what it ought to be, it is possible that Judge Parker would be permitted to sit in that case and help determine it before it is finally decided.

## RESUMÉ LEGAL DECISIONS

As a kind of a resumé of what I have said let me ask how did the law stand when the Red Jacket case came on for consideration?

First, the Supreme Court in the Hitchman case by a divided court had sustained an injunction restraining the defendants from persuading em-



ployes to disregard their contract; but in that case, as construed by the court later, it was only when the persuasion was accompanied by deception and misrepresentation—such deception and misrepresentation as would lead employes to join the union without notifying their employer—in other words, dishonestly, deception, with a view at the proper time of carrying on a strike.

Secondly, the Hitchman case had been explained and limited in its meaning in the Tri-City case. In the latter case, Justices Holmes and Brandeis agreed with the majority, but Justice Clarke dissented. He filed no opinion, but simply recorded his dissent. In other words, the Hitchman case was not to be understood as holding that persuasion could be enjoined unless it was accompanied by some unlawful act, such as deception and misrepresentation. It was clearly intended by the Tri-City case to place a construction upon the Hitchman case, which would limit it in its purport.

Third, under the Tri-City case it was held that labor unions were lawful, that they were necessary; that a single employe could not protect himself against his employer, and that a union is necessary to place the employes upon an equality with the employer.

Fourth, under the Tri-City case it was held that labor unions have a right to use all lawful propaganda to enlarge their membership, and that their acts in this respect become subject to judicial restraint only when they are accompanied by such unlawful acts as deception and misrepresentation.

Fifth, persuasion and propaganda for the purpose of enlarging the membership of a union can never be regarded as malicious or unlawful in and of itself. The persuasion to breach that kind of a contract can never be regarded in and of itself as unlawful. Why? Because back of it is a legal and lawful purpose to increase the membership of a union, which union is necessary to the equality of the working man.

Sixth, that in order that persuasion may be restrained or come under judicial cognizance it must be accompanied by something more than peaceful persuasion. As an illustration, the court holds that communications and discussion looking to the influence of another's action cannot be regarded as in violation of any other man's right. If it is accompanied, however, by annoyance, by persistent, dogging interference with work, such as is calculated to induce intimidation or disturbance of the work, it may be restrained, which things could be restrained even if there were no contract.

Now, what did the court hold in the Red Jacket case as a finality?

I contend that the Red Jacket case went further than any other case which has been decided by the court. I contend that the Red Jacket decision ignored or disregarded the construction and limitation placed upon the Hitchman case and the Tri-City case. I contend that the opinion chose to follow the Hitchman case rather than the latter case, the Tri-City case; that the Red Jacket case is the only case which has enjoined the use of persuasion or reason against the "yellow dog" contract where such persuasion or reason is not accompanied by unlawful acts of themselves; that in the Red Jacket case there was no charge or proof of deception or misrepresentation, as in the Hitchman case.

I further contend that the action of the court in sustaining and protecting the "yellow dog" contract was not necessary to a full and complete

protection of the rights and interests and property of the plaintiffs. The injunction restraining intimidation, threats, misrepresentation, violence, or trespass was ample and sufficient to give full protection to the property and property rights and to the life of employes.

I do not agree with the doctrine sometimes thrown out that it is unlawful for a union to increase its membership and to use persuasion for increasing its membership, although the union has in contemplation a strike. A strike is lawful. A union has a right to strike; and we should be in a pitiable condition in this country today if working men did not have that right and had not had. So it depends on what the Senator means by "unlawful." If he means that they are accompanying their persuasion by threats and violence and destruction of property, then I say they can be restrained, but they could be restrained if there were no contract. What I am trying to get rid of, and what I wish to pivot in the attention of the Senate, is this little contract by which the company makes them agree not to join a union.

There are reasons for refusing a writ of certiorari aside from the merits of a controversy, and I do not know whether it was a question of form, or some question of proceeding, whether the error was raised directly, or whether the court thought it was not sufficient merit. I have no means of knowing.

It is possible that the Supreme Court might have come to that conclusion, it might have taken the view of the Hitchman case again and returned to it, I do not know; but it does not seem to me reasonable.

I want to ask the Senate this question: Suppose the court in the fourth circuit had modified the decree in accordance with the contention of the attorneys for the defense. Suppose the court had modified that decree so that persuasion should only be restrained when accompanied by what the court had said in the Tri-City case were unlawful acts. How could it possibly have been error before the Supreme Court of the United States?

What error could possibly have been assigned for the court modifying the decree in accordance with the contention that only unlawful acts, such as intimidation or deceit, should be significant of the right of the plaintiffs to have a decree? It could not have been error under any circumstances.

I contend that the circuit court of appeals went much further than either the Hitchman case or the Tri-City case, but if the court below had sustained those cases and had been in perfect accord with those cases, I would not myself vote to put a man upon the Supreme Court who was committed to the doctrine, regardless of how he became committed. I think this is so fundamental, so righteous in and of itself that I could not get my consent to put upon the Supreme Court a man who has already declared his position upon the question. The court is divided; the controversy is there again; and if the Senate decides that Mr. Parker should be confirmed, it is in moral effect a decision of the Senate in favor of the "yellow dog" contract.

#### RESPONSIBILITY OF SUPREME COURT

Much has been said in the last few weeks about the duty of the Senate when a nominee comes before it for the Supreme Bench of the United States. The doctrine has been put forth that all we have to do is to read the name and vote our approval, that our function here is to accept without inquiry or sincere investigation the appointment of the



President. I am one of those who believes that nowhere in the whole scheme of government did those who gave us the Constitution, construct with such brilliancy and boldness as in the creation of the Supreme Court of the United States. In many respects this part of their work was peculiarly original. Here was a task which called for the pioneer in statecraft, which called for the highest order of constructive statesmanship.

They conferred jurisdiction over controversies between sovereign States. They made this court the final interpreter of the great charter under which we live as a Nation. No right, no privilege is guaranteed by the National Government to citizens but may some time come under the supervision of this tribunal. In the wide sweep of its power, granted it has found authority for holding void an act of Congress itself, the Congress which represents the people themselves. No where in all the history of jurisprudence is there a tribunal approaching our Supreme Court in dignity and power.

Finally, they determined to give to those who should have a place upon that bench a life tenure. With all these vast powers, they were still to sit for life. They intended to remove them as far as practicable, after they reached the court, from the fears or the favors of politics.

I am not complaining of anything which the fathers did; I am not urging any change. I want the Supreme Court, as an institution, to stand as the fathers created it—the proudest monument to their genius.

In preserving that court in all its usefulness and power, there devolves upon this body a high and an almost sacred obligation. Our part is not merely a perfunctory part. The President selects, but he only selects. No man can sit upon that tribunal without the approval of this body. Ours is the most important part. It is the greater obligation. No one can review our action. From our judgment there is no appeal. It is a stupendous obligation, and to perform it perfunctorily or without the sincerest investigation would be a betrayal upon the part of the Senate of the highest trust which has been imposed upon it.

In passing upon the fitness of nominees to that court we are bound to take into consideration everything which goes to make up a great judge—his character and standing as a man, his scholarship, his learning in the law and his statesmanship.

Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, for the widest and broadest and deepest questions of government and governmental policies are involved.

And, finally, we must weigh his conception of human rights, for we all know that the law takes on something of the heart and soul, as well as the intellect, of those who construe it.

In the face of such an obligation, such responsibility we dare not shirk any part of our duty. We may differ here, sincerely differ, as to whether this or that nominee should be confirmed, but we cannot differ upon the proposition that we are honestly to record our convictions as to his fitness.

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William E. Borah—Congressional Record, April 29, 1930; pages 8218-8226.

## HON. ROBERT F. WAGNER, SENATOR FROM NEW YORK

It is my intention to vote to sustain the committee which has reported adversely on Judge Parker's nomination as Justice of the Supreme Court. My present purpose is, in justice to myself, to set forth the reasons which prompted me to come to this conclusion and to persuade, if I can, my colleagues whose minds are still open on this question, likewise to vote to reject the nomination.

I do not often enter upon the terrain of debate in which the Senate is now engaged, because frankly, I dislike to discuss men. I prefer to consider problems. It is only under compulsion of the constitutional duty of "advice and consent" in the nomination of Supreme Court judges—a duty too important to be shirked—that I permit myself to express my thoughts on the pending question.

### THE JUDICIAL PROCESS

Let me say at the outset that I do not question Mr. Parker's integrity. Nor do I doubt that he possesses a knowledge of the law. That is but the lawyer's stock in trade. It determines admission to the bar; it is alone insufficient for elevation to the highest court. To pass upon a nomination for that office it is first necessary to survey the requirements of the post, to plumb its profound responsibilities, to calculate its importance in terms of its influence upon the welfare of our country. Only then is it possible to make an appropriate comparison between the magnitude of the place to be filled and the size of the man who has been called to fill it.

The judicial process has been studied for thousands of years. Few students of the subject in our day have been rewarded with as rich an insight into that process as Benjamin Cardozo, Chief Judge of the New York Court of Appeals. In his well-known volume, the *Nature of the Judicial Process*, he emphasizes that an important phase of the work of judges is lawmaking, and that the decisions they render are law-in-the-making. The present Chief Justice of the United States Supreme Court many years ago expressed a similar thought in an epigrammatic phrase when he said:

The Constitution is what the judges say it is.

We are today all fully aware that the Constitution we live under and the laws we are judged by are not a lifeless set of wooden precepts moved about according to the rules of a mechanical logic. At least I should say that the law is never that in the hands of great judges. The Constitution of the United States today is what the judges of the past have made it and the Constitution of the future will be what the judges appointed in our day will make it, and it is, therefore, by the standard of makers of the Constitution that nominees for the Supreme Bench must be judged.

President Adams' term of office expired 129 years ago. In the perspective of the intervening generations the most important event of his administration was his appointment of John Marshall as Chief Justice



of the Supreme Court. Such is the durability of judicial work that many a decision today still runs on the track of reasoning which John Marshall laid down.

To cite a contemporary example, I take the liberty to point to Mr. Justice Holmes, called to the Supreme Court by the appointment of President Roosevelt in 1902. Today he is known to us as the great and beloved dissenter. His dissenting opinions are not, however, merely the record of a past disagreement having no significance in the world of coming events. These opinions, too, enter into the soil of the judicial process and will slowly through the years irrigate it and fertilize it until it will in time bring forth a living law which more closely corresponds to ideal justice.

The point is that appointments to the Supreme Court must be judged by long-time standards. They certainly should not be made by reference to immediate political opportunities. Presidential administrations come and go; laws are made and repealed; alongside of these judicial pronouncements are relatively immortal.

No man of ordinary capacity who merely happens to fit into the political and geographical necessities of the moment can pass muster if tested by these standards. The peculiar quality required of a Supreme Court judge can best be described by the term "statecraft." Its possession is indispensable.

One of our closest observers of the work of the Supreme Court, Felix Frankfurter, in his recent lecture at Yale University, expressed this idea effectively:

### JUDICIAL STATECRAFT

With the great men of the Supreme Court, constitutional adjudication has always been "statecraft." As a mere lawyer Marshall had his superiors among his colleagues. His supremacy lay in recognition of the practical needs of the Government. Those of his successors whose labors history has validated were men who brought to their task insight into the problems of their generation. The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the lives of a progressive people.

At the present time three problems of major importance divide the Supreme Court. The first deals with the question: What are the limits within which a State may exercise its police powers and taxing powers to accomplish ends loosely referred to as social welfare? New problems, generally arising out of present-day urban and industrial conditions, have been met by the several States in a variety of ways. Many of the methods attempted by the States have been declared invalid by a divided court. The problem is not yet settled. In the nature of things it can never be settled. Every new decision is but the driving of a new stake in the boundary line between permissible action and prohibited action. The nature of the personnel of the Supreme Court will determine whether the area of permitted action shall be wide and free or narrowly restricted.

The second of these problems is identified with the relatively new and expanding field of public-utility regulation.

The third is concerned with industrial relations: What is the scope of permissible action by employes in attempting to further their economic interest?

Little, if anything, is known of the nominee's attitude or experience in dealing with the first two problems. On the third his record discloses

an opinion sanctioning the anti-union or so-called yellow-dog promise. It is an opinion which obviously merits special consideration.

What is this much-discussed instrument, the anti-union contract? How is it made? What are its uses? What are the effects of its use? I should prefer to discuss it, first, without regard to its legal status, and to appraise it from the point of view of the layman.

### ANTI-UNION CONTRACTS

An anti-union contract is sometimes a promise exacted by an employer from an employe not to join a union so long as he remains in his employ. Sometimes it is a condition of employment imposed by the employer that the employe shall refrain from joining the union as long as he is employed. This arrangement is consummated either by having a written instrument to that effect at the time of the hiring or during the course of employment, or by orally informing the applicants for employment that the shop was operated non-union and that all employes were expected not to belong to the union.

The use of this instrument is a very unique one. No employer ever sued any employe for violating it. No employer ever expects to do so. That is not its purpose. Its utility lies solely in the fact that it affords a basis upon which to apply for an injunction restraining anyone from attempting to persuade the employes to unionize.

In a general way that is what occurred in the Hitchman case. That is what occurred in the Red Jacket case. There are differences between the two which I shall discuss later. That is what the company attempted to do in the Interborough cases. Before discussing the legal validity or the legal consequences of this arrangement there are, to my mind, some plain, simple layman reactions to this whole business which ought to be stated.

The layman understands that every contract is essentially a bargain. Let us now try, if we can, to visualize how this strange bargain, if it be one, comes into being.

John Smith, an unorganized worker out of work, comes to the factory of the X Y Z Co. in search of a job. He meets the personnel manager, hat in hand. He is told that a job is open, but he is given to understand that the plant operates on a non-union basis and that one can not belong to the union and work there. He understands he is directed to sign a card stating that he will not join a union so long as he is employed by the X Y Z Co. He signs. What else can he do? Is he to refuse the job because of the curtailment of a possible right in the exercise of which he has no present interest? Can he hope to persuade the smart-looking personnel director that the contract interferes with what he regards as an inalienable right freely to associate with whomever he pleases? And if he should fail by persuasion, can he possibly hope to change his employer's attitude by holding out? Every day it costs money to live and every day's labor lost is gone forever beyond recovery. There is the job, together with its terms. Take it or leave it and go hungry. Of course, he takes it.

To jobless John Smith it does not occur at the time that he is consenting to an arrangement which will render him powerless ever to insist on better terms of employment. And if it does occur to him, there is nothing he can do about it.



All this is but another way of saying that between the large employer and the unorganized worker there is such a disparity and inequality of bargaining power that the talk of a contract between them arising out of the free assent of the two parties is as fictitious but not as harmless as the old Mother Goose rhymes.

Smith's rejecting the job means nothing to the X Y Z Co. If Smith will not have it Brown will. To Smith it means rent, food, clothing, and schooling for his children. The employer can afford to wait until his terms are met. Smith can not wait. His employer knows conditions; knows whether employment is plentiful or scarce; knows what he wants and knows how to get it.

It is extraordinarily simple and easy to insert yellow-dog contracts into terms of employment. If employers should be foolish enough to use them, and the courts should enforce them by injunction, then the well-organized, responsible trade unionism we have known is doomed. Only underground, rebellious, revolutionary, secret association will flourish in its place. The injunction will silence the voice of every responsible union organizer. But the underground revolutionist who pays little attention to law and less to injunctions will flourish like a green bay tree.

These are considerations which appeal to the lay mind as well as to the professional. One need not have read Blackstone to understand that there is something inherently unfair in such an arrangement. No acquaintance with Supreme Court decisions is necessary to understand the probable effects of such a regime upon the future of industrial relationship. Nor is it necessary for us to consider at this time whether an employer may insist that only unorganized labor shall be employed in his plant.

For purposes of present discussion it is sufficient to inquire whether, if he so insists, he must educate his employes to be satisfied with his terms or whether the courts will render him immune from the flow of ideas and the current of world discussion and the persuasion of workmen that in union lies their salvation.

### SHALL COURTS ENFORCE ANTI-UNION CONTRACTS?

Does the fact that an employer hangs a sign on his factory gate, "No union men wanted here," at once call into play all the force and all the power of the equity courts of the Nation exerted in their full strength to silence everyone who would tell any of his employes that unionism is worth while? The citizen untrained in the law will naturally draw his own analogies. He will ask: "Would the courts be equally solicitous to protect the man who insisted that only the heathen could work in his plant? Would a court enjoin a missionary from preaching the gospel to his employes? And suppose that he employed only Republicans in his plant? Would a court of equity enjoin a Democrat from electioneering among the employes? Or suppose that the employer insisted upon unmarried men in his plant, would the court restrain the clergyman's blessing upon a marriage vow?" Of course, none of these would be enjoined, but under identical conditions the effort of men to organize to better their conditions of employment was balked by Judge Parker's injunction.

To the worker organization means bargaining power, security, self-respect. So long as he continues unorganized he must accept terms of

employment just as they are as tendered. It is only through organization that he achieves the power to withhold that which he sells. The arrangement known as the anti-union or yellow-dog contract is ordinarily an undertaking on the part of the employe that he will continue to remain in the same helpless condition which compelled him to make the yellow-dog promise in the first instance. Is it good social policy to give full play to a device to accomplish that which medievalism accomplished through class stratification? Is it sound American practice to permit that system to be reproduced on this continent? Already in the mining towns of West Virginia the employer owns the miner's home, from which a court of equity will at the operator's request expel him. The employer owns the worker's city, his school, his church. Is he also to own and control his power of speech and association?

These briefly are the terms of the anti-union contract, the way in which it is made, the purposes for which it is entered into, the effects which it is likley to have, and the questions which it raises.

The following is what Prof. Edwin R. A. Seligman, well-known professor of economics of the Columbia University, said in reference to the anti-union promises:

\* \* \* The world has not yet succeeded in finding a solution for the so-called labor problem. Whatever that solution may be, both history and philosophy conspire to advise against the adoption of any policy which will render the solution more difficult and perhaps impossible. The conditions of this contract seem to the affiant clearly to fall within the latter category. The affiant would therefore strongly urge that the court withhold its approval from such a reversal of public policy which certainly presents no clear advantages, and which contains such potential dangers.

Paul Howard Douglas, professor of economics, University of Chicago, reacts to the anti-union promise in the following language, which I read because it is so pertinent to this discussion:

To grant the injunction which is sought would permit employers to put a legal ring around their plants to prevent their being unionized. To grant such further protection of the law to the ability of the strong to force terms upon the weak, which the latter would not consent to were he on approximately equal terms with the other party, is to bring the boasted equality of the law into disrepute and is to inflict a heavy and unwarranted blow at the institutions which the comparatively weak have built up to protect themselves.

Our own Commissioner of the Bureau of Labor Statistics, Ethelbert Stewart, gives expression to a view that is commonly held when he says:

In fact, I think the law should make criminal these one-sided so-called labor contracts.

Especially persuasive is the report of the United States Coal Commission on Labor Relations in Bituminous Coal Mining, which made a special investigation of the effects of the use of the anti-union contract in coal mines:

We recommend that such destructive labor policies as the use of spies, the use of deputy sheriffs as paid company guards, house leases which prevent free access, and individual contracts which are not free-will contracts be abolished.

Of peculiar interest is the finding of the United States Coal Commission on Civil Liberties in the Coal Field:

Many operators—

Operators, mind you—

however, do not use the "yellow dog" contract, believing that it is immoral.

It was this sort of an agreement that was presented to Judge Parker in the Red Jacket case.



The Red Jacket Mining Co. employed each man with the understanding that he would not join the union so long as he worked for the Red Jacket Co. The United Mine Workers, nevertheless, sent agents to persuade the employes of the Red Jacket Co. to join the union. The Red Jacket did not attempt to meet argument with argument.

#### GETTING THE FACTS THAT DISCLOSE THE MEANING OF LEGAL PROBLEMS

It did not even go through the form of attempting to persuade its men that its method of employment was superior and that they ought not to join the union. It did not exercise the power which it possessed to fire the men who joined. Instead it appealed to the equity court to restrain the organizers from persuading its employes to join the union. How did Judge Parker react to this application? Did he inquire into or consider the inequality of bargaining power between the Red Jacket Co. and each of its employes? Did he consider the consequences to unionism if such applications were generally granted? Did he inquire into the consonance of such a limitation upon public speech with American institutions? Did it occur to him that if such an injunction issued it would mean that under the protecting wing of the Federal courts every form of bondage could be imposed upon workers and that all resistance on their part would be rendered futile?

The most devastating criticism of Mr. Parker, the one fact which alone, in my judgment, is sufficient to disqualify him to hold the position to which he has been nominated is the fact that he failed totally to react. The application aroused in him no response. It called forth in him no evaluation of this device in the government of our people or its effect upon industrial relations. He was not what Cardozo called the sceptic on the bench. The instrument was labeled a contract, and he accepted it as labeled, without question, without doubt, without thought, totally oblivious of its possibly catastrophic effects upon the future. That failure to be aware of the fact that he was in the presence of an important problem shows a lack of statecraft which is the *sine qua non* of the high judicial office to which he has been nominated.

I have not as yet discussed the law pertinent to this case. The present point is that where there is no appreciation of the vital issue underlying the litigation, no amount of legal training or judicial experience can supply the shortage.

And now I insist that the law did not call for the injunction in the Red Jacket case. It is inconceivable that the law is so out of touch with realities that it fails to give adequate weight to the considerations which I have enumerated. Neither principle nor precedent justified this injunction. Indeed, the Court of Appeals of New York found that both principle and precedent required the denial of a restraining order under a very similar state of facts. The decision of the New York court was rendered in the case of *Interborough Rapid Transit Co. vs. Lavin*. The Interborough Co., employing some 14,000 men, for reasons sufficient to itself, tired of unionism, and thereafter based its relations with its employes on the understanding that the men were not to join a union. The national union interested in the particular trade—in this case the Amalgamated Association of Street and Electric Railway Workers of America—sent its agents into the city of New York to persuade these employes to organize. The company at once applied for an injunction to restrain interference

with its contracts of employment and to enjoin anyone from persuading its employes to affiliate with the union.

The Court of Appeals of New York denied the right to such an injunction. It considered the purposes of the national union in organizing these particular employes. It recognized that the standards of employment in one branch of the trade necessarily influenced standards of employment in another branch of the same trade, and that the union was therefore strictly within its legal objects in attempting to bring these 14,000 men within the sphere of its influence and thereby to augment their bargaining power. The court held that the union was at liberty to pursue such an object as long as it pursued it peacefully and without deception.

At least in one State it has thus been definitely decided that an injunction will not issue to prevent peaceful interference by a union with a "yellow dog" contract. As counsel for the defendants in that case I helped the court to arrive at that decision. There is nothing in my professional work since I have retired from the bench from which I have derived greater satisfaction or greater pride.

### IN CONFLICT WITH PUBLIC POLICY

Out of a host of principles of law pertinent to the Red Jacket case the first that comes to mind is the general rule that no contract is entitled to enforcement if it is in conflict with public policy.

The great value of this rule lies in its flexibility, in its power to comprehend new standards and new conditions. It is one of the great moving forces in the law which enables it to be stable and yet not to stand still. Whether a particular contract violates public policy in 1930 can not be determined by reading the precedents in *Coke on Littleton*. It is the public welfare of this generation that the law seeks to conserve.

What is the evidence on the question of public policy?

There is the story of every commission that has gone into the coal fields that the "yellow dog" contract and the injunction to which it gives rise are supplanting civil law and government. There is the deliberate conclusion of mature students of the subject that they are rendering impossible the solution of the labor problem. There is the testimony of one commission that many coal operators regard this so-called contract as immoral. There is the historical fact that State legislatures believe that it ought to be a criminal offense to make such a contract.

All this is cumulative evidence that the anti-union promise is in conflict with public policy. Certainly, no court of equity ought to give it validity.

Another well-established principle has decisive bearing upon the issue raised in the Red Jacket case—the principle that courts will not enforce a harsh and unfair bargain. Compare the give and take in this employment arrangement. What do the employes and employers exchange? Primarily work for wages. But what does the employe secure in return for his additional promise not to join a union? Does the company promise not to fire him when and as it pleases? It does not. Does the company promise not to join a combination of employers to force wages down? It does not. The employer continues entirely unhampered. His liberty of action is in no wise curtailed, but the worker has surrendered his power of self-defense against possible economic oppression. Such a bargain is harsh and unfair. It is not entitled to the extraordinary protection of an injunction.



These are general principles of universal application. They should have governed the disposition of the Red Jacket case.

But, in addition, there is one clear-cut, conclusive reason why on Judge Parker's own statement of facts this injunction should never have issued. I have reference to the very simple fact that the employes were urged to do only that which they were at perfect liberty to do under the very terms of their contract. Such was the fact as found by the district court and approved by Judge Parker. On any theory of law whatsoever, there was, therefore, no interference with anyone's rights and no violation of law to be enjoined.

Now let me prove what I have said:

The men at Red Jacket could be fired at any time without assignment of cause. They could quit without stating the reason. Their employment was at will. What, if anything, did they promise? They promised not to join the union so long as they were employed at Red Jacket. And what were they persuaded to do by the union organizers? They were urged to join the union and quit.

This point is so important that it merits verification. I therefore read from the findings of the lower court:

That the union's agents were inducing the plaintiff's employes—

To cease working for said plaintiff and to become members of said union.

Judge Parker fully agreed with this finding, for in his opinion he said that in this case the organizers were attempting to—

Induce them \* \* \* to join the union and go on strike.

Now, why was it not perfectly lawful for the union to persuade the men to do that which the contract itself permitted them to do? How is that the inducement of a breach of contract? The men had agreed to quit if they joined the union, and that is exactly what they were persuaded to do. There was nothing unlawful in that.

The one and only inference that can be and must be logically drawn from the Parker decision is that he holds it unlawful for a union to organize workers in a trade and persuade them to go on strike—contract or no contract. There is precedent for this idea; but Judge Parker will have to go much further back than the Hitchman case to find it. He might discover it in that benevolent age of a hundred years ago, in which also flourished the fellow-servant rule and similar barbarisms of our law. Only there can Judge Parker find the precedent or inspiration for the conclusion that must be drawn from his opinion. He said the union was not unlawful of itself. It was lawful as long as it was willing peacefully to curl up and die. But it became unlawful the minute it tried to extend its membership, its scale of wages, and its conditions of employment into the coal fields of West Virginia.

The implications of this case are far wider than the sanctioning of the "yellow dog" contract. It threatens the right of self-organization by workers in any manner whatever.

No one has yet lifted a finger to defend the justice of these anti-union contract injunctions. No one in this Chamber has yet offered to approve the propriety of the anti-union promise; but Judge Parker, sitting in a court of equity, sanctioned it, approved it, and enforced it with the most powerful weapon in the arsenal of our courts.

## JUSTICE NOT MECHANICAL

The President, through his Attorney General, says apologetically that Judge Parker in doing so was constrained to follow the Hitchman case. This apology is an exceedingly hollow one for a number of reasons.

I lay aside temporarily the important fact that in truth the two cases are not parallel. I can even afford to overlook the significant absence from Mr. Parker's opinion of any language of constraint. If, indeed, Judge Parker felt himself bound to decide the Red Jacket case as he did by reason of the compulsion of the Hitchman case, then he exhibited an excessively narrow understanding of the function of legal precedents.

Between the decision in the Hitchman case and the Red Jacket decision 10 long years had intervened, crowded with unprecedented discussion on the implications of the anti-union promise. The keen analysis and the new insight into this instrument which was thereby made available had their effect on the Supreme Court, and in American Foundries vs. Tri-Cities Trades Council (257 U. S. 184-11) Chief Justice Taft pinned the Hitchman decision on the fraud and deceit which were present in that case. He said:

The unlawful and deceitful means used were quite enough to sustain the decision of the court without more.

Present in the Red Jacket case was another factor, the policy of Congress laid down in the Clayton Act, a policy perhaps not strictly governing it by reason of judicial decision but none the less expressive of the new appreciation of the scope of permissible union activity. Present also in the Red Jacket case were the obvious effects of the anti-union promise coupled with the injunction upon the coal industry. As a member of the Senate investigating committee I had the opportunity to witness those results at first hand: Business disrupted; industrial relations destroyed; civil government displaced; civil rights unknown; and poverty, resentment, and the seeds of rebellion everywhere. The Government commissions had already uncovered the facts and condemned the practices when Judge Parker wrote his decision. He must have known them, but apparently these vibrant facts had no meaning for him. These are factors which great judges take into consideration but which are overlooked and neglected and whose significance is missed by the kind of judges who seek a precedent and lean upon it.

It is easier to follow the beaten track than to clear another.

With prophetic pen, Judge Cardozo anticipated that precedent would some day be used in defense of lack of progress. In his Growth of the Law he provided the answer:

\* \* \* Judges march at times to pitless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity. One who seeks examples may be referred to Dean Pound's illuminating paper on Mechanical Jurisprudence. I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices. We should know, if thus informed, that magic words and incantations are as fatal to our science as they are to any other. Methods, when classified and separated, acquire their true bearing and perspective as means to an end, not as ends in themselves. We seek to find peace of mind in the word, the formula, the ritual. The hope is an illusion.



We think we shall be satisfied to match the situation to the rule, and finding correspondence, to declare it without flinching. Hardly is the ink dry upon our formula before the call of an unsuspected equity—the urge of a new group of facts, a new combination of events—bids us blur and blot and qualify and even, if may be, erase. The counterdrive—the tug of emotion—is too strong to be resisted. What Professor Dewey says of problems of morals is true, not in like degree, but none the less, in large measure, of the deepest problems of the law; the situations which they present, so far as they are real problems, are almost always unique. There is nothing that can relieve us of “the pain of choosing at every step.”

But Judge Parker did not in his opinion indicate that he even tried to make a choice of two possible roads and that he was compelled to walk the one he did by the force of binding precedent. He was totally oblivious to “the urge of a new group of facts.” He felt no “tug of emotion.” There was but an explicit determination, by the citation of a previous case, to avoid “the pain of choosing at every step.”

I will interpolate here to refer to another matter which was brought to my attention after I prepared my remarks. Yesterday there appeared in the *Columbian Law Review* for this month an article on labor injunctions, and the author of the article did me the honor, which I learned for the first time yesterday, to quote at length from an opinion I wrote in a labor dispute in 1922. I am reading it only because of the suspicions that frequently attach to one's motives. The ideas I express now I expressed in an opinion in 1922.

Since the author did me the honor to quote from the opinion, I will read just that much of it as indicated that I was not entirely oblivious to this situation several years ago, for I said in that opinion, writing in the lower court, by the way:

Precedent is not our only guide in deciding these disputes, for many are worn out by time and made useless by the more enlightened and humane conception of social justice. That progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate can not be ignored by the courts. Our decisions should be in harmony with that modern conception and not in defiance of it. Some *nisi prius* adjudications rendered in these disputes, disputes in which the public is as much interested as the contending parties, have in my judgment reflected a somewhat imperfect understanding of the trials and hardships experienced by the workers in their just struggle for better living conditions.

That is contained in an opinion which I wrote in 1922, and I do not suppose anybody would charge me with anticipating at that time this particular controversy.

#### RED JACKET DECISION UNJUSTIFIED BY PRECEDENT AND PRINCIPLE

Now, we come to the final question: Did the Hitchman case actually foreclose Judge Parker's judgment in the Red Jacket case? Let us compare the two cases:

In the Hitchman case the court found the following facts:

First. An anti-union promise.

Second. A union actuated by a malicious purpose.

Third. Deception and abuse in the methods employed by the union organizers.

Fourth. The employees persuaded to join the union and stay at work secretly.

In the Red Jacket case the court found the following facts:

First. An anti-union promise.

Second. A conspiracy in restraint of interstate commerce.

Third. No evidence of deception or fraud.

Fourth. Men persuaded to join the union and quit.

On their very face the two cases are far apart. Let us continue the analysis of each of the four groups of facts:

First. The only factor they have in common is the anti-union contract. But had not Chief Justice Taft already stated in the later Tri-City case that the fraud and deceit, rather than the contract, explained the decision in the Hitchman case?

Second. Judge Parker approved a finding that the union was engaged in a conspiracy in restraint of trade. He could not have approved this finding unless he believed and held that it was unlawful for a union to extend its membership and its influence in order to improve the conditions of the workers in the industry. Is that the law in the United States?

There is not a lawyer in this Chamber who would agree that such is the law. The notion that a union was an unlawful conspiracy has been dead and buried too long to be disinterred at this late day.

There was no finding of conspiracy in the Hitchman case. Had Judge Parker rejected the conspiracy finding the court would have been entirely without jurisdiction in the case and the injunction could not have issued. Yet, we are told that Judge Parker was constrained to follow the Hitchman case!

Third. There was no fraud and deceit in the methods of the organizers in the Red Jacket case. In the Hitchman case the court based its decision upon these facts. Yet we are told that Judge Parker but followed the precedent of the Hitchman case!

Fourth. In the Hitchman case the court found that the men were persuaded to join the union and secretly continue at work in violation of their understanding with their employer. No such fact was present in the Red Jacket case. Quite to the contrary, the court specifically found that the men were persuaded to join and quit. That was not violative of the terms of the employment arrangement. That was not in breach of any possible contract. That was perfectly lawful. Yet we are told that Judge Parker but followed the Hitchman case!

Judge Parker has written a letter to the Senator from North Carolina (Mr. Overman), which was given to the press and reproduced in the Record. There was little in the letter which was not already known. But it is a conclusive bit of evidence that Judge Parker has not to this very day emerged from the misapprehension in which his Red Jacket decision is rooted. In his letter he cites in support of his opinion the case of *Coppage vs. Kansas* (236 U. S. 1). Nothing can be clearer than that the case of *Coppage* against *Kansas* has no bearing whatever upon the question in the Red Jacket case. The *Coppage* case held invalid a statute making it a crime for an employer to exact from his employe a promise not to join a union. The case did not hold:

First. That a contract in which an employe promises not to join a union is valid.

The case did not hold:

Second. That such a contract confers upon the employer equitable rights.



The case did not hold:

Third. That an employer has any rights, legal or equitable, against third persons who induce a breach of such a contract.

But the Red Jacket case held all three.

There is a world of difference between the position taken in the Coppage case that a law which made the exaction of such a promise a crime is invalid, and the position taken in the Red Jacket case that such a promise is enforceable. When the court holds that such a statute is unconstitutional it takes the position that the Government should keep its hands off and should not interfere in the struggle to bring about or to prevent unionism. The court in the Red Jacket case took a position diametrically opposite—that the Government should interfere to prevent unionism by the strongest measures available. To cite the Coppage case in support of the Red Jacket decision is an incomprehensible piece of legal misunderstanding.

The same court which decided *People vs. Marcus* (185 N. Y. 257), which is directly paralled to and in agreement with the Coppage case, also decided *Interborough* against *Lavin*, which is squarely in conflict with the Red Jacket case.

I believe I have sufficiently established that neither principle nor precedent justified the Red Jacket injunction.

Judge Parker's sympathies as reflected in the record are not mine. His attitudes I do not share. But more important than either of these, in my judgment, is that measured by the standards erected. Judge Parker is found wanting. He lacks the statecraft essential to the office which he seeks. Guided by my conscience in the exercise of the duty imposed by the Constitution, I must withhold from the President my consent to this nomination, and in imparting the advice required under the constitutional mandate I satisfy myself to quote once again from Chief Judge Cardozo that it would be well for the President to—

\* \* \* Know that the process of judging is a phase of a never-ending movement, and that something more is exacted of those who are to play their part in it than imitative reproduction, the lifeless repetition of a mechanical routine.

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Robert F. Wagner—Congressional Record, April 30, 1930; pages 8336-8340.

## HON. GEORGE W. NORRIS, SENATOR FROM NEBRASKA

Mr. President, much has been said during the course of this debate in the way of criticism of those who are opposing the confirmation of Judge Parker on the ground that they were not treating the Supreme Court of the United States with proper respect, and that they were indulging in a debate that was in reality detrimental to the principles of our Government and to the highest power within the Government. For myself I want—and I believe I can speak for all those who are opposed to Judge Parker's confirmation—to deny any such insinuation; I want to deny that we have any lack of respect for Judge Parker, for the Supreme Court, or for any other judge, or that we have any lack of respect for the appointing power. I deny that any man, either in the Senate or outside of it, has a higher ambition to be just and fair to the Supreme Court and to treat it with the proper respect which is due it than have I.

I am moved in my opposition to the confirmation of Judge Parker because I want to preserve that great judicial tribunal, the Supreme Court of the United States, and keep it on a higher plane than, in my judgment, it would be if we permitted it to be filled with men who have the one idea, that wealth, big business, combinations are prime considerations, and who believe in the virtue of large aggregations of wealth. I am opposed to Judge Parker, I am frank to admit, because I do not believe in his ideas. I have no personal animosity toward the nominee in this case; I will not say a word that by any possible construction could be considered as disrespectful of him as a citizen or as a public official. I am proceeding on the theory, Mr. President, that he is moved by what to him seem to be proper motives, and that he is performing what he believes to be his duty. In anything that I shall say about other judges I concede that same thing.

I conceive it to be the duty of a citizen constructively to criticize any public official, whether he be on the bench or in the legislature. Not only is it his duty to make such criticism but it will redound to the preservation of the principles of our government; such criticism will help to keep the fires of liberty burning upon the altar of human freedom.

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\* \* \* Every step that this old world has ever taken in the advancement of civilization has been due to the fact that somebody in the minority had the wisdom and the courage to step out into the open and blaze the trees through the wilderness of doubt and superstition. If no voice had been raised against ignorance and lust, superstition still would rule the world, and guillotines decide our least dispute. The few who dare must speak, and speak again, to right the wrongs of many.

The minority of today, in the advancing trend of civilization, becomes the majority of tomorrow. Minorities are not always right, but they are not wrong simply because they are minorities; and the thing that has made Justice Brandeis dear to every liberty-loving soul is the minority opinions that he has written, expressing the heart throbs of one who loves



his fellow man, and has the courage against all odds to stand up for his rights.

\* \* \* \* \*

In one of the labor disputes, the records from several of which I will soon quote, one case went to the Supreme Court of the United States, where an injunction was sustained against the laboring man, which was passed on, from the time it commenced until it reached final decision in the Supreme Court, by 13 Federal judges. We commence with the district judge, then go to the courts of appeal and the Supreme Court, and when we analyze the decisions and take the votes of all of them, we find that of the 13 judges six were in favor of denying the vicious injunction and seven of them supported the injunction.

After the act of Congress, by a vote of 5 to 4, had been declared unconstitutional, we brought about an amendment to the Constitution. That majority of 5 to 4, I think, required 16 or 17 years of work before an amendment to the Constitution was finally adopted which made such a law constitutional.

What happened? Just think of recent history. That amendment to the Constitution, giving Congress the right to pass on income tax law, became part of the Constitution shortly before the World War. One of the first things we did was to resort to it to raise money to carry on that war. We exhausted the power of the American people to absorb bonds. We had great difficulty in selling the last bonds, and if it had not been for the fact that we were empowered to pass an income tax law to collect revenue, we could not have raised the money we raised to carry on the war.

God only knows what the result might have been. Everybody, however, does know that it would have been an impossibility for us to raise the money we did raise had it not been for that amendment to the Constitution, which, to a great extent, perhaps, went far in bringing victory instead of defeat to our soldiers upon the field of battle. Yet such a law was denounced from the bench of the Supreme Court as being only the beginning in the destruction of property.

Property rights! That is the contest that has gone on ever since the world became civilized. In every battle that has been fought, in the various steps we have taken from barbarism, it was a contest between human beings and dollars, and it is going on yet.

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It is said that Judge Parker had to follow the Supreme Court in the Hitchman case. It is even said that that was a part of his oath. Of course, no judge takes such an oath. Thank God that is not in a judge's oath. But it is said he had to follow the Supreme Court and he did follow the Hitchman case. It was shown very conclusively, I think, by the Senator from Idaho [Mr. Borah], the Senator from Montana [Mr. Walsh], and the Senator from New York [Mr. Wagner] that it was not necessary for him to follow the Hitchman case. There was a way around it. The Hitchman case had been decided many years before the Red Jacket case came before Judge Parker. There were some things in the Hitchman case that did not exist in the Red Jacket case.

But I concede very frankly that Judge Parker had a right to follow the Hitchman case. I am not accusing him of an ulterior motive in doing

it; but it does show the bent of his mind. It does show, as Roosevelt said, from which side of this question he was approaching. That is shown conclusively. He decided to follow the case that would bring about the affirmation of the injunction. I concede, let me say again, that he had had a right to do it, but when he did it he was falling far short of the ideas laid down by President Roosevelt.

Let me digress to say that while I have given some evidence here of others greater than I and whose shoes I am not worthy to lace, criticising the Supreme Court of the United States, I could follow it up with criticisms from all of the great statesmen I have named. But I am not basing my criticism upon the fact that somebody else has criticised the courts. I am free to say that I would criticize them if I thought they deserved criticism even if none of these eminent men who have preceded me had criticised them. I conceive it to be a duty which the citizen owes and it is a double duty which the Senator owes, upon whose shoulders rest the responsibility of giving his approval in every case before a man can go upon the Supreme Bench. But if Judge Parker had not desired to follow the Hitchman case, but felt that he was compelled to follow the Hitchman case, he might have used a sentence or a word showing what his real sentiments were. Senators here have said that would not have been proper; that it was his duty to find out what the Supreme Court had decided and then follow it, making no comments. Let me call the attention of Senators to a very eminent precedent, since we are following precedents—a precedent in our own day from our own Supreme Court, where an apology was made from the bench by a judge of that court who agreed to a decision against his idea of what it ought to be because, as he said, he felt bound by a prior opinion of the court. That was Mr. Justice Stone. I quote from his opinion:

As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co. vs. United States* (221 U. S., 1); *United States vs. American Tobacco Co.* (221 U. S., 106, 178-180), I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. But, in *Duplex Printing Press Co. vs. Deering* (254 U. S., 443) these views were rejected by a majority of the court and a decree was authorized restraining in precise terms any agreement not to work or refusal to work, such as is involved here. Whatever additional facts there may have been in that case, the decree enjoined the defendants from using "even persuasion with the object or having the effect of or causing any person or persons to decline employment, cease employment, or not to seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from the complainant.

These views—

Says Justice Stone—

which I should not have hesitated to apply here, have now been rejected again, largely on the authority of the Duplex case. For that reason alone I concur with the majority.

So, Judge Parker, who, it has been stated, always follows precedent, had a precedent in the Supreme Court if he had had the heart and the inclination to go in that direction.

Mr. President, I am not belittling the value of precedent; I am not



saying that a precedent should not have its weight ; I realize that it should have ; but the judge who is only a case lawyer and who never goes into the reasoning behind an opinion is not fulfilling my idea of what a judge ought to be ; he is not complying with the definition of Roosevelt which I have read.

Justice Brandeis in that same case rendered a dissenting opinion.

Says Justice Brandeis :

If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman law, and the Clayton Act an instrument for imposing restraint upon labor which reminds of involuntary servitude.

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Mr. President, most of the judges who issue injunctions against labor say, "We are in favor of union labor. We are in favor of organization of the workmen. We want them to organize. They have a lawful right to organize." But if you will follow their injunctions you will find that after they are organized they will not permit them, under those injunctions, to do anything.

What is the use of an organization unless you have a right to meet and discuss things with each other ? It makes me think of the father who was importuned by his little boy, who wanted in the spring of the year to go swimming ; and he said to the boy, "Yes, my child ; you can go swimming, but if you get wet I will thrash you when you come back."

I want to read what President Taft said. In an address accepting the nomination for President on July 28, 1908, Mr. Taft thus expressed his sympathy with the early Federal practice in the case of a lawful strike :

In the case of a lawful strike, the sending of a formidable document restraining a number of defendants from doing a great many different things which the plaintiff avers they are threatening to do, often so discourages men always reluctant to go into a strike from continuing what is their lawful right. This has made the laboring man feel that an injustice is done in the issuing of a writ without notice. I conceive that in the treatment of this question it is the duty of the citizen and the legislator to view the subject from the standpoint of the man who believes himself to be unjustly treated, as well as from that of the community at large. I have suggested the remedy of returning in such cases to the original practice under the old statute of the United States and the rules in equity adopted by the Supreme Court, which did not permit the issuing of an injunction without notice. In this respect the Republican convention has adopted another remedy, that, without going so far, promises to be efficacious in securing proper consideration in such cases by the courts by formulating into a legislative act the best present practice.

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As I said a while ago, that the courts have not been fair to labor ; that the "yellow dog" contract, in my judgment, is void. It is void for three reasons : First, it is without any consideration ; second, it is signed under coercion ; third, it violates public policy. I admit, Mr. President, that the court has decided otherwise. I am going to have something to say a little further on in regard to the "yellow dog" contract, but I have given it as my conclusion, and it seems to me it is the only conclusion that can be reached ; that it is void. Even the able Senator from Rhode Island [Mr. Hebert], while he advocated the confirmation of Judge Parker in a very able speech, was fair enough and honest enough to say to the Senate after he read the "yellow dog" contract, that he would not sign such a contract, even if his family were suffering from the want of food.

Let us see what the court does when it has before it a case between two corporations. The case which I have mentioned was a case where one

corporation was supplying light and power to the citizens of a municipality who had entered into contracts to buy electricity at so much per kilowatt hour for a certain length of time. Then another corporation entered the field. It ran its wires into the town and undertook to secure customers. It endeavored to induce the customers of the first corporation to cut their wires and to attach them to its wires and to become its customers. In this case a valid contract had been entered into for a good consideration, but the customers of the first company violated their contract when they signed up with the second company and disconnected their wires from the wires of the first company. If a "yellow dog" contract may be enforced by an injunctive process, an honest contract ought to be able to be enforced by an injunctive process when such contract is violated; but what did the court say in that case? It said, "This is not a case for an equity court to issue an injunction."

The trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have the correlative right to solicit the custom to which the contract relates. Whatever damage results to the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition. Were the law otherwise, the first person occupying the field of public service in many localities, by procuring long contracts to take water, light, and the like from him, might entrench himself in a monopoly there for years, because another thereafter could not solicit customers, thus bound, to change their patronage to him, and thereby enable a rival enterprise to enter the field.

So the court left them to their action at law; and the first company, which had lost its customers, if it had a valid contract with any customers and was damaged because they violated it and broke it, had a right to sue them in court and collect whatever damages could be proven. So, in the case of the "yellow dog" contract, even if we waive its cruelty, if we waive its inhumanity, and say it is legal, the court ought to say, "You have a contract; the law will enforce it; you can collect damages if it is violated; but we will not issue an injunction to prevent a third party from advising anyone to violate the contract, to break it, or to breach it."

The miners would be prohibited from consulting a lawyer in order to obtain advice as to whether they had a right to violate that "yellow dog" contract.

### RED JACKET CASE

Mr. President, I will now come to the Red Jacket case. I have not covered the field by any means; I can give the Senate hundreds of other cases; I have only been giving some illustrations; they are all alike; the Red Jacket is no exception. I told the Senate about the Pennsylvania injunction that was issued in dozens of cases, restraining men from following out their rights in State courts in order to retain possession of their property.

Let us consider the Red Jacket case. The Senator from Alabama [Mr. Black], just before I took the floor, put into the Record the particular part of that injunction to which I now wish to call the attention of the Senate. As the Senator from Alabama said, it has not previously been discussed in this debate.

First, I will read a provision of the injunction in the Red Jacket case that has been discussed. The injunction, among other things, enjoined the members of the United Mine Workers—



(2) From trespassing upon the properties of the plaintiffs, or either of them, or by themselves, or in cooperation with others, from inciting, inducing, or persuading—

They were enjoined from “persuading”—

the employes of the plaintiffs to break their contract of employment with the plaintiffs.

(3) From aiding or assisting any other person or persons to commit or attempt to commit any of the acts herein enjoined.

(4) From aiding or abetting any person or persons to occupy or hold without right any house or houses or other property of the plaintiffs, or any of them, by sending money or other assistance to be used by such persons in furtherance of such unlawful occupancy or holding.

It is true that the court used the word “unlawful,” but what had that Federal judge to do with the right of a man to live in a house where he had his family? What did he have to do with the right of that man to defend in the State courts under the State law his right to live in that house? This injunction prohibited him in effect from doing that; it prohibited anybody from assisting him in doing that. He could not protect his rights to retain possession of the house for himself and his family unless he had the right to defend himself in court. He does not commence in court an action of forcible entry and detainer; such action is commenced by the landlord when the landlord undertakes to put him out. The State law gives him a right to defend himself; it gives him a right to appeal. This injunction, sustained by Judge Parker, denies that right, although it would be exercised in another court, a State court. How can such a proceeding be defended?

### MENACE TO LIBERTIES

Mr. President, that is one of the effects of the “yellow dog” contract. It means, as I look at it, an interference with the liberties of the American people. As I said a moment ago, such injunctions are now applied mostly to miners who work in the bowels of the earth, but there is no reason why they should not be applied to everybody who toils. It would be just as logical to apply them also to the man on the farm, the man in the store, the man anywhere who is laboring to sustain himself and his family. If carried to the logical conclusion that is where they will go, and then the cry against “government by injunction” will become universal, instead of being local or perhaps confined to judicial districts or to counties and to States which are affected by the injunctions themselves. There is no reason why a judge should not issue this kind of an injunction against a clerk as well as a miner, against a farmer as well as a miner, and that will be the result if such proceedings shall be allowed to continue.

So when a man signs that kind of a contract, he has become, for the time being, the slave of the master, and the judge denies him his right to freedom. Such a contract is void because it has no consideration. The Senator from Rhode Island read such a contract the other day. I have before me the copy of another one which is very similar to that read by the Senator from Rhode Island. According to the copy I have the man who signs the contract agrees as follows:

I accept the company's right, at its option, to operate its plants and mines such number of hours each shift as the requirements of the business demand.

I reserve the right to leave the company's employ at any time—

That is fair, is it not? But let us read the remainder of the sentence—

upon such reasonable notice to the superintendent of my department as will afford him time to fill my place.

And that is not unreasonable; but it only works on one side. The very next sentence gives the employer full liberty to discharge the employe, without notice, at any time and without reason. So reciprocity only goes half way.

Then the employe agrees in another provision that he will not join a union, and so forth.

Such contracts ninety times out of ninety-one are signed under duress, and they mean a denial of the liberty of the citizen. Such contracts, as Justice Brandeis said in his dissenting opinion, smack of involuntary servitude.

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Mr. President, I agree with the Senator from Ohio [Mr. Fess] that Judge Parker is only an incident. I go further than that, and say that the Supreme Court is only an incident. The thing that is important and the issue that is here is the preservation of human liberty. It is to keep burning the fires of human freedom that our forefathers laid upon the altars of our country. It is not the Supreme Court. It is something greater than the Supreme Court. As Roosevelt says, it is not only our liberty of today but it is the liberty of the men tomorrow. It is the liberty that we ought to endow upon the children that are yet in the womb of time. Human liberty is at stake. Human slavery is showing its hideous face in front of our institutions. We can not permit such things to continue. The very stability of our Government will not permit it.

Mr. President, we wonder why in these strikes there is turmoil. We wonder why there is bloodshed. We wonder why there are attacks made upon citizens—wrongful, lots of them—from both sides. They can not be defended upon any idea of justice. But can anything be different from that if we permit these inhuman, these wicked, these unfounded, these illegal, these illogical injunctions, these injunction-made laws to send men to prison without jury trial, tried before the man who makes the law?

Mr. President, I have here a cartoon taken from a newspaper. It is the picture of a man applying for a job. He is standing before the rich manufacturer. He is out of work. He wants to be able to support himself and his family, and as he presents himself before the mahogany-top table of the employer he is presented with a yellow dog contract. In substance, that contract says, "I agree not to organize for my own protection."

What does he do? In the mists that seem to surround him and that pervade the atmosphere of the room he sees a picture. Dimly behind the scenes in his mind's eye he looks into his own home. He sees the wife of his bosom standing there, holding to her shriveled breasts her babe, his child, and beside the pleading mother stands at her feet a little boy, the image of his father, his son, grasping the tattered fragments of the torn skirt of the mother and looking up into her face through blind tears, pleading with that mother for bread. When he sees that pic-



ture, what does he do? What would you do, my brothers? What would I do? What would the professor of history do? What would you do, Mr. President?

I know, and you know, and God knows, that there is only one escape. We must sign on the dotted line, and so this man signs. He goes, perhaps, down into the bowels of the earth. The coal king's slave he is, digging there the coal. He has signed a contract by which he has agreed not to join a union, not to consult with his fellows about bettering his condition. He has signed a contract that says that the employer can change the hours of labor, the conditions of labor, and the price of labor without his consent. He has agreed to it all in advance to save the wife and babe and boy. But as time goes on the hours are lengthened. He has to work longer. He has to commence earlier. He has to work later. The wages, perhaps, are cut down; and after a while he realizes that he is losing his physical strength. He sees that he is being ruined; that he can not live and keep up the pace. So he consults his fellow workmen—men in the same condition, with the same kind of a family. He violates his contract when he does it, and he does it stealthily. He is afraid he will be caught; and after he has consulted with the men, his companions, they come to the conclusion that they can not stand the labor that they are doing; they can not put up with the inhumanity; they can not remain the slaves of this coal king without a protest. So they organize, so that combined they may demand better working conditions and better wages. But when they do it they violate this sacred "yellow dog" contract, and they know it. They are afraid. They are cowed. They must do something to save their own lives and to protect their wives and families, and yet the very thing they are doing they have agreed not to do.

What would you do? What would I do? What would the professor of history do? What would any man do? We would do just what they have done. We would organize regardless of this wicked contract; and when the court came on, it would enjoin our own wives from giving us assistance! It would enjoin our own friends from giving food to our children! It would enjoin anyone from coming to our aid, from furnishing an appeal bond if we wanted to stay under the shelter of the roof where we were paying rent to a landlord. We would be enjoined from all that.

Would we feel like obedient citizens? Would we feel like law-abiding citizens? Would it be any wonder if we broke some law, if we violated some rule? Would it not be human to find wrongdoing, to find destruction of property, and all that follows those things?

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I have no ill will against this nominee or against the judges who have issued these unkind, these cruel decrees. They have a different viewpoint from mine. They believe that we should enthrone men in power with great wealth, and that when they use their wealth to carry on, with the use of their wealth, from their mahogany-top tables, there will be some crumbs brushed off, and those who toil can grovel at their feet and get their sustenance there.

I believe we ought to put more humanity into the courts. We ought to have judges who would have the humanitarian viewpoint. That is my view. If some one else has a different view and thinks we ought to have

different kind of judges, men who will follow precedents regardless of anything and everything, that is his right; I do not criticize him.

I have tried to make my case. I concede others have the same right to make theirs. But I can not get away from the idea that if we will not some time, somewhere, put a curb upon the injunctive process of the Federal judges the time will come when our boasted liberty will fade away, when chains of human slavery will be fastened upon every man who toils. I believe that; and how can we reach it? At the present time this may not be a logical way; it may not be a good way; but, as I see it, it is the only way; to pass upon these judges before we give them an opportunity to pass on the people of the country. It may not be the desirable procedure. We perhaps ought to have the way marked out by Judge Marshall. Perhaps it would be better if we could overrule a decision of the Supreme Court by legislative enactment. But everybody knows we can not do that. Everybody knows that that is not a practical proposition now, at least. We have not the constitutional authority to do it, and it would be perfectly futile to try to get the constitutional authority. So we are down to this one thing.

When we are passing on a judge, therefore, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of those qualifications—but we ought to know how he approaches these great questions of human liberty. This is the great tribunal that Roosevelt said and that everybody knows leads the way in constitutional questions for the change of our Government, the greatest lawmaking body on earth, with power that no one can overrule or override, whose word is final, whose decrees are final, and from whose word and judgment there is no appeal. Therefore we ought to know that everyone who ascends to that holy bench should have in his heart and in his mind the intention of looking after the liberties of his fellow citizens, of construing every question of law on the basis of present civilization, of discarding if necessary the old precedents of barbarous days, and construing the Constitution and the laws in the light of a modern day, a present civilization. \* \* \*

Mr. President, I close as I began. Judge Parker is only an incident. The Supreme Court is only an incident. Human liberty is the issue. The preservation of our Government is the issue.

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George W. Norris—Congressional Record, May 2, 1930; pages 8468-8479.



## HON. THOMAS J. WALSH, SENATOR FROM MONTANA

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I shall endeavor in what I have to say this afternoon to avoid occupying any ground which has heretofore been trodden. I take occasion to say that some sort of an idea has arisen that a judge of a lower court is under obligation under all and any circumstances to follow slavishly a decision by a superior court. Of course, it has been clearly established in the debate thus far that the Hitchman case was not on all fours with the Red Jacket case; that Judge Parker might very easily, by a careful study of his own case and of the Hitchman case, have realized that there was a material distinction between the two, and likewise by a study of the Tri-City case he could easily have arrived at the conclusion that the Supreme Court of the United States had to some extent at least modified the views it had expressed, or at least the conclusion at which it had arrived, in the Hitchman case.

### RULE OF PRECEDENTS NOT INVARIABLE

Waiving that, I desire to assert that there is no such hard and fast rule as has been suggested. Of course, under all ordinary circumstances it is to be expected that a lower court will follow a direct precedent of a superior tribunal, expecting, as a matter of course, that if the case goes to the superior tribunal again the same conclusion will be arrived at, and the litigant would be put, therefore, to the unnecessary expense and trouble of an appeal to the higher court.

The rule is by no means invariable, as I learned to my cost in the first case I ever took to the Supreme Court of the State of Montana. I found in the Supreme Court of that State an adjudication directly in point in the case I had before me. My opponent in the lower court, however, argued that that case was against the clear weight of the authorities, and he succeeded in impressing that view upon the trial court, and, notwithstanding the direct adjudication, the judgment went against me.

I went to the Supreme Court with a great deal of confidence and called attention to the opinion.

My opponent, when he opened his case, with some trepidation and with some modesty, expressed to the court the view that this precedent stood in the way of a decision in his favor, but he asked of the court, in a modest way, whether he might not address himself to the soundness of that decision. Having no answer from the court, he immediately proceeded to argue the fallacy of the original decision, with the result that the court reversed itself, and the judgment against me was affirmed. The case was Thornberg against Fish, reported in the eleventh volume of the Montana Reports.

A later case will be found in Seventeenth Montana, the case of Fitzgerald against Clark, where a similar condition was presented.

In an earlier case, the case of Amy and Silversmith Co., the Supreme

Court of Montana had interpreted the mining law, which was a law of Congress, in a certain way applicable to a certain state of facts. That case went to the Supreme Court of the United States, and the Supreme Court of Montana was reversed, the Supreme Court of the United States holding that it was in error in the construction which it gave to the act.

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The case arose in Montana, went to the Supreme Court of Montana, which laid down principles of construction applicable to the case, then an appeal was taken from that to the Supreme Court of the United States, and the Supreme Court of the United States in that case reversed the Supreme Court of Montana, and laid down a contrary rule.

Later another case, the case of Clark against Fitzgerald, arose, presenting, however, exactly the same question presented in the Amy and Silversmith case, and in that particular instance the Supreme Court of Montana was, in the just sense, inferior to the Supreme Court of the United States, the question at issue being a Federal question arising under a Federal statute. Of course, the case of Amy and Silversmith was appealed to, and the question was, shall the Supreme Court of Montana follow the decision of the Supreme Court of the United States in the Amy and Silversmith case, or should they take up the question anew and determine it as an independent proposition? The opinion in the case was written by one of the most able men who ever sat upon our Supreme Bench, Judge DeWitt. He said in the opinion:

We shall not renew the discussion of the cases upon this question decided by the United States Supreme Court prior to May 21, 1890, the date of our decision of the Amy & Silversmith case. Our best construction of those decisions is found in our opinion in that case. We there met the problem which had for years engaged the earnest attention of lawyers who had to do with mining litigation, i. e., the preservation of the intent of the mining statutes when they are applied to a location in which exploration has demonstrated that the apex and strike of the vein do not pass through both end lines of the location. We gave our best endeavor and research to that decision, and arrived at a result which we were willing to concede was not wholly in accord with the decisions of the United States Supreme Court upon that subject, but which we believed could, with a very little effort, be reconciled with those decisions, and which we were wholly satisfied was the only practicable working solution of the problem in all its phases, and which we were also wholly satisfied was fully within the intent of the United States mining laws. Even with the profound respect which we, in common with all courts, entertain for the decisions of the United States Supreme Court, we think that there is no impropriety in saying, and that it is due to ourselves to say, that the longer we observe the daily operation of the mining laws in practical affairs the more satisfied are we that our decision of the Amy & Silversmith case was correct. We are strengthened in this opinion by the views of other courts to which we shall hereinafter refer. But the United States Supreme Court is the court of last resort upon this subject, and our opinions, as a rule of decision, must be abandoned if they are in conflict with the declarations of the superior tribunal. If that court had given no further utterance upon this subject since its decision of the Amy & Silversmith case, we should feel that we must, however reluctantly, desert the principle which we sought to maintain in that case. But, as will be seen in the review of the cases below, that distinguished tribunal has given a hint that it is willing to reconsider the principle involved. Upon that hint we feel that we are justified in approaching the subject much as if it were res integra, and, without subjecting ourselves to the criticism of judicial insubordination.

Accordingly, Mr. President, they proceeded to review all of the cases upon the subject, and reasserted the doctrine which they announced in the Amy and Silversmith case. An appeal was formally taken to the Supreme Court of the United States, which reversed the Amy and Silver-



smith case and affirmed the judgment in the case of Clark against Fitzgerald.

I dare say there is scarcely a lawyer upon this floor who has had any considerable practice in the appellate courts who will not be able to refer to some instances where the lower court was convinced that a decision of the Supreme Court was wrong, and that upon a reconsideration of the subject the Supreme Court would announce a contrary doctrine.

So, Mr. President, there would have been no impropriety whatever in Judge Parker saying that, in view of the conclusion that was arrived at in the Tri-City case, he felt that there would be no impropriety upon his part if he undertook to review the decisions, and call attention to the repeated denunciation of the so-called "yellow dog" contract, to which the Senator from New York adverted yesterday. He did not, I believe, however, include a declaration by the former Chief Justice Taft, made while he was the president of the War Labor Board during the war. There was at that time a strike among the street car operatives of Council Bluffs and Omaha, and it became the duty of Judge Taft's War Labor Board to endeavor to adjust controversies of that character, so that the activities of the war should not be interrupted or interfered with. In reporting upon that particular labor controversy Judge Taft said:

The practice of the company in times past to make restrictive contracts—

That is, contracts which provided that the operator would not join a union—

The practice of the company in times past to make restrictive contracts such as shown to the arbitrators, if continued, would be contrary to the principles of the National War Labor Board. However, counsel for the company states to the arbitrators that this practice has been abandoned and calls for no further action on the part of the arbitrators.

It was abandoned, I take it, because doubtless the officials of these roads felt as did officers of some other corporations referred to by the Senator from New York, who declared that in their judgment the contract was not a moral one. So it would have been equally no violation of propriety whatever upon the part of Judge Parker had he said that, while he had no sympathy whatever with the rule prescribed in the Hitchman case, and felt that it was contrary to the more modern conception of the duties of labor and capital toward each other, he felt constrained to follow the decision in that case.

Or he might have adverted to some of these other considerations and said that, having those in mind, he was disposed to adopt that view, but that he felt under obligation to follow the decision in the Hitchman case. There is absolutely nothing whatever in the decision of Judge Parker or in what he said in the opinion that leads us to believe that he is not entirely in sympathy with the doctrine of the Hitchman case and with the idea that the so-called "yellow dog" contract is protected by the Constitution of the United States and is, so far as that is concerned, a perfectly justifiable arrangement from an economic standpoint.

Mr. President, it would not have been at all out of his way had he said something like that said by another eminent North Carolinian. I refer to the opinion of the circuit court of appeals in the Hitchman case written by Judge Pritchard, at one time a Senator from the State of North Carolina in this body, a man of great learning, of great eloquence,

and of great sympathy with the laboring classes. It will be remembered that in the Hitchman case the trial judge, the district judge, granted an injunction, the injunction which was eventually sustained by the Supreme Court of the United States. He granted that injunction upon the ground that the United Mine Workers of America was an unlawful organization and conspiracy in restraint of trade, and for other reasons. The case went to the circuit court of appeals, where the judgment was reversed and then eventually went to the Supreme Court of the United States, which reversed the judgment of the circuit court of appeals and affirmed the judgment of the district court.

#### A JUDGE REFUSED TO ENJOIN BREACH OF ANTI-UNION CONTRACT

The opinion in the circuit court of appeals was, as I said, written by Judge Senator Pritchard. I adverted to the fact that the trial judge had held that the United Mine Workers of America was an unlawful conspiracy, and in order to support that holding he referred to the decisions of a bygone age which he asserted established that condition of things as the common law. It could easily be established that that never was the common-law rule, but that by reason of later statutes in Great Britain combinations of that character had been held to be in violation of the law. But Judge Pritchard, commenting upon the judgment of the district court in that particular, said, and I am reading from Two hundred and fifteenth Federal Report:

The growth and development of the common law occurred when property rights were recognized as paramount to personal rights. At that time there was little, if any, concert of action on the part of the laboring people, owing to their helpless condition, due in the main to their ignorance. Their domination by the landowner and capitalist was absolute in most respects, and as a result they were as helpless as those held in slavery before our great war. Under such circumstances, it is no wonder that we have many decisions in the past at common law, as well as the enactment of statutory laws, by virtue of which it was almost a physical impossibility for those who earned their living by honest toil to accomplish by organized effort those things necessary to elevate them to a plane where they could assert those rights so essential to their welfare.

The industrial development of the world within the last half century has been such as to render it necessary for the courts to take a broader and more comprehensive view than formerly of questions pertaining to the relation that capital sustains to labor.

Then, I read from page 702, as follows:

The court below was also of the opinion that the rules of the organization undertake to "control, or rather abrogate and destroy, the right of the employer to contract with the men independent of the organization." If it is meant by this statement that under the rules it is possible by peaceable, persuasive, and other lawful methods to induce a majority, if not all, of the miners of any particular locality to join the union and thereby place the mine owner in a position where it may be necessary for him to negotiate with union labor in order to operate his mines, then the conclusion reached by the court below is entirely correct. However, the fact that such a result would be possible under this rule could not in any way affect the legality of the organization, because it has been repeatedly held by the courts that a labor union may use all lawful methods for the purpose of inducing others to join its order, and until the contrary is shown it must be assumed that only lawful methods are to be employed for the accomplishment of such purpose.

Then, at page 703, he continued:

However, in this instance the plaintiff has adopted a policy by which only non-union men may be employed. If the plaintiff may for the purpose of protecting its interests adopt a policy by which only non-union men can secure employment at



its mines, and such conduct be sanctioned by the law, by what process of reasoning can it be held that the defendants may not adopt the same method in order to protect their interests? If the plaintiff is to be protected in the use of such methods, and the defendants are to be restrained from using lawful methods for the purpose of successfully meeting the issue thus raised by the plaintiff, then indeed it may be truthfully said that capital receives greater protection at the hands of the courts than those through whose efforts capital in the first instance was created. But such is not the law; and when we consider the testimony as respects the conduct of the defendants at and before the institution of this suit, we are of the opinion that the plaintiff has not by a preponderance of the evidence shown that these defendants employed unlawful methods as alleged in the bill.

He continued:

At one time this identical mine employed union labor, and in all probability would have continued to do so had it not been for a controversy which arose as to certain adjustments and the parties failing to reach an agreement the plaintiff decided to employ only non-union labor.

It further appears that the plaintiff is paying the non-union men the same wages that are being paid union men. Therefore, under these circumstances, is it not as reasonable to infer that the plaintiff is endeavoring to place the laborers of that section in a position where it would be master of the situation as it is to infer that the defendants are seeking to destroy the business of the plaintiff? While it is true that the plaintiff has a perfect right to refuse to employ union labor, is it not equally true that union labor, as we have stated, may by the employment of legitimate means do that which is necessary to keep its forces together?

Surely we have not reached the point when capital with its strong arm may adopt a plan like this for protecting its interests, while on the other hand the laboring classes are to be denied the protection of the law when they are attempting to assert rights that are just as important to their well-being as are the rights of those who have been more fortunate in accumulating wealth. He who "seeks equity must do equity." In other words, he "must come into court with clean hands." If the courts of this country should by injunctive relief protect the mine owner in the enjoyment of his property rights and restrain the laboring people from organizing their forces by declaring such organization unlawful, would not the mine owner then be in a position to control the situation so that he who has to toil for his daily bread would be placed in a position where if he exists at all he must do so at such wages, and upon such terms as organized capital may see fit to dictate?

Then I read a concluding paragraph, as follows:

The court below also reached the conclusion that the defendants have caused and are attempting to cause the non-union members employed by the plaintiff to break a contract which it has with the non-union operators. The contract in question is in the following language.

This comes to the gist of the matter as it is presented to us here. This is the contract:

I am employed by and work for the Hitchman Coal & Coke Co. with the express understanding that I am not a member of the United Mine Workers of America and will not become so while an employee of the Hitchman Coal & Coke Co.; that the Hitchman Coal & Coke Co. is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Co. I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company that I will not make any efforts amongst its employees to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.

Then the learned judge said:

It will be observed that by the terms of the contract that either of the parties thereto may at will terminate the same, and while it is provided that so long as the employee continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employees to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the

contract recover damages for a breach of the same. In other words, the employees, under this contract, if they deem proper, may at any moment join a labor union, and the only penalty provided therefor is that they can not secure further employment from the plaintiff. Therefore, under this contract, if the non-union men, or any of them, should see fit to join the United Mine Workers of America on account of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the non-union miners to become members of their organization.

Under these circumstances, we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization.

I read this particularly because Mr. Justice Brandeis, in the same case, called attention to the fact that there was no breach of the contract whatever on the part of any man who quit the employ of the coal company and joined the union. The simple point was that under the contract he could not join the union and remain in the employ of the coal company. So anybody who induced him to quit the employ of the company and join the union was not endeavoring to have him break his contract at all.

Mr. Justice Brandeis, in his dissenting opinion in the Hitchman case, said:

Fifth. There was no attempt to induce employees to violate their contracts.

The contract created an employment at will, and the employee was free to leave at any time. The contract did not bind the employee not to join the union, and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ if he joined the union. There is evidence of an attempt to induce plaintiff's employees to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

Mr. President, although the learned Judge Pritchard called attention to the fact that there was no violation of the contract in inducing the employees to quit the plaintiff's employ and join the union, and, although Mr. Justice Brandeis in his dissenting opinion called attention to that, the decision of Judge Parker, without even adverting to the contract or even quoting it in the opinion anywhere, charged the defendants in that case with having induced the plaintiff's employees to violate their contract, and they were enjoined from continuing to do so. I am left with the impression that the learned Judge Parker was either entirely indifferent to these considerations thus advanced by his predecessor, Judge Pritchard, or he was entirely in sympathy with the "yellow dog" contract.

## TWO POLITICAL SCHOOLS

Mr. President, there is another suggestion to which I wish to advert. Almost from the very beginning of our Government there have existed



two schools of thought with respect to our National Government and our political system: One that this Government of ours enjoys, for one reason or another, a large measure of implied powers, flowing from general conditions, from the Constitution as a whole, and, perhaps, from the idea that ours is a nation having all the powers of those nations in which all the powers of government are centered in one authority.

On the other hand, Mr. President, there are those who believe in what is known as the restricted construction of the Constitution, and the restriction of the powers of the National Government, leaving the powers generally to the States except where expressly delegated or where it is clearly implied from the Constitution that they are delegated.

Mr. President, as I think, it is a fortunate thing that those two schools of thought have, for the greater part of our history, been represented upon the Supreme Court of the United States. The learned Senator from Ohio [Mr. Fess] the other day in his interesting review of the illustrious men who have had a place in the work of that great tribunal adverted to two of its most shining lights—Marshall and Story. Marshall, of course, stands, as is generally believed and recognized, at the head of those who have adorned that bench, and next to him is Joseph Story. Marshall was a Federalist, one of the leaders of that party, and one of the ablest exponents of that theory of our government. Story, on the other hand, was a Democrat. He was appointed by Madison in 1811. Those two schools of thought, in a general way, have been represented by the two great political parties into which our electorate has been divided.

So, during the entire period of the occupancy of this bench by these two men, these two great schools of thought were there represented, and so it has continued down to our time, until the problems incident to the limitations on the Federal Government have come to be fairly well defined. But in our time, Mr. President, there have arisen conflicting schools of thought with respect to economic problems rather than political and governmental problems, and, as was made plain in a discussion in this Chamber not long ago, the Supreme Court of the United States on many questions that come before it divides upon these economic questions involved in the lawsuits which the court is called upon to adjudicate. Included in these, Mr. President, are cases involving labor controversies, and it is a rather startling fact that one can almost anticipate when such a controversy comes before the Supreme Court how one set of judges will decide upon the question and what attitude another group will take.

#### FOUR EPOCHAL CASES

Including the Hitchman case, there have been four epochal cases before the Supreme Court of the United States involving labor disputes. In every one of those cases there was a dissenting opinion by Justices Holmes and Brandeis, sometimes participated in by other justices. In the Hitchman case Justices Holmes and Brandeis dissented, and with them was Mr. Justice Clarke.

In 1921 there came before the court the case of Duplex Printing Co. against Deering, a case which involved an injunction against members

of labor unions in the city of New York for refusing to work upon printing presses manufactured in the city of Detroit by non-union labor. The injunction was sustained by the Supreme Court of the United States, Justice Holmes, Justice Brandeis, and Justice Clarke, the same three, dissenting.

The case of *Truax* against *Corrigan* came a little later, reported in Two hundred and fifty-seventh United States Reports, decided December 19, 1921. That case arose under a statute of the State of Arizona forbidding the issuance of injunctions in labor disputes. It was held that that statute was unconstitutional, being contrary to the fourteenth amendment to the Constitution, and therefore void. Justices Holmes, Brandeis, Clarke, and Pitney dissented.

Later on the case of *Bedford Cut Stone Co.* against *Journeymen Stonecutters* came before the court, presenting questions not unlike those in the *Duplex Printing Co.* case, workers in the city of New York declining to work upon stone coming from the Bedford quarries in the State of Indiana because produced by non-union labor. Justices Holmes and Brandeis dissented and Justices Stone and Sanford concurred in the majority opinion because of the earlier decision in the *Duplex Printing Co.* case.

I might say likewise, Mr. President, that going back to the case which is relied upon as holding that the so-called "yellow dog" contract is a valid contract, the case of *Adair* against the United States, decided in Two hundred and eighth United States Reports, December 27, 1908, Justices Holmes and McKenna dissented.

It will be observed that of these dissenting Justices Clarke and McKenna have already left the bench, McKenna having passed to his reward and Clarke having retired of his own volition. Pitney likewise has passed to the great beyond, and there remain of these dissenting judges, these judges who took a different view of these questions from the majority of the court, but Holmes and Brandeis. Holmes, the grand old man of the American bar, regrettable as it may be, must, of course, soon cease his labors. Brandeis has already passed the retiring age, and when they go who will there be left to represent the views which they have upheld? Mr. Hughes was elevated to the Chief Justiceship a short while ago, obviously having views in a general way in harmony with those of the majority of the court. And now it is proposed to put another man on the bench whose views, if we are to judge from the *Red Jacket* case, are in harmony with those of the majority.

I think, Mr. President, that it would be singularly unfortunate if this other view, whether it is sound or whether it is unsound, were not represented in that tribunal, so that at least in the deliberations of the court the other idea might have at least one exponent.

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Thomas J. Walsh—Congressional Record, May 1, 1930; pages 8408-8412.



## HON. HIRAM W. JOHNSON, SENATOR FROM CALIFORNIA

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I read just a line from the "yellow dog" contracts, so called. I assume that all are familiar with them; but, nevertheless, here let me read in order that it may be in juxtaposition to some words that I wish to read of a man whom it is unfashionable to quote nowadays here, or perhaps in this materialistic age to utilize as an authority upon any subject whatsoever.

These are the controlling provisions of the contracts that have been the subject of discussion:

That during his employment said employe will not become a member of any labor union and will have no dealings, communication, or interviews with officers, agents, or members of any labor union in relation to membership of such employe in any labor union, or in relation to the employment of such employe.

Again:

I agree, during employment under this contract, that I will work efficiently and diligently and will not participate in any strike nor unite with employes in concerted action to change hours, wages, or working conditions.

Words utterly fail me in characterization of contracts such as that. I care not whether they have been enforced by the one court or another. Legally, they are void as against public policy; socially, they are wicked and destructive of ordinary human relations; economically, they are unsound as resting upon necessity on the one side and coercion upon the other; and morally, sir, they are infamous, denying fundamental rights and disrupting the dearest human associations.

These contracts that are part of the discussion in this case, upon which the mind of this appointee has been indicated in the Red Jacket case, come before us now finally for our determination—at a tangent, it may be, and only incidentally—but finally come before us for ultimate determination.

"Socialistic," says my friend from Ohio [Mr. Fess], are assaults that are made upon the Supreme Court in this Chamber. "Socialistic," echoes man after man in this body, in relation to what may be said about this applicant or another. "Socialistic," he says, to deal at all with the Supreme Court, or to be heard in opposition to any man or to any set of men who may seek to make of that court the reflection of their peculiar economic views. "Socialistic," sir, to stand here and denounce a contract such as that that has been upheld by Judge Parker in the Red Jacket case. "Socialistic"—and exactly the same epithet was hurled in the United States some years ago upon another case of like character, the Dred Scott decision, wherein human liberty was at stake; no more important than this, where industrial freedom is at stake. And I read, sir, with such haste as I may, what was said by Abraham Lincoln on the occasion when he discussed the denunciation of Stephen A. Douglas of his characterization of the Dred Scott decision and the United States Supreme Court.

How apt it is! How prophetic were the words then! No longer fashionable is it to quote Abraham Lincoln in this materialistic age. No longer, sir, is it apposite, in this era of ours, where everything apparently

is devoted to exploitation and to the making of money—no longer, sir, is it the appropriate thing to speak of Lincoln and his humanity and his desire for equal opportunity for all men and for all women in this land.

Mr. Lincoln said, in answering Judge Douglas:

A little now on the other point—the Dred Scott decision. Another of the issues he says that is to be made with me is upon his devotion to the Dred Scott decision and my opposition to it.

I have expressed heretofore, and I now repeat, my opposition to the Dred Scott decision; but I should be allowed to state the nature of that opposition, and I ask your indulgence while I do so. What is fairly implied by the term Judge Douglas has used, “resistance to the decision”?

The same words echoed in this Chamber in the last 10 days in this debate.

I do not resist it—

Said Mr. Lincoln—

If I wanted to take Dred Scott from his master, I would be interfering with property, and that terrible difficulty that Judge Douglas speaks of, of interfering with property, would arise. But I am doing no such thing as that, but all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new Territory, in spite of the Dred Scott decision, I would vote that it should.

That is what I should do.

\* \* \* \* \*

Mr. President, Lincoln dared criticize the Supreme Court. Lincoln dared criticize a decision of the Supreme Court. He said of the Dred Scott decision, coining a word, that it was an “astonisher,” and that he “went for reversing it.” I say to you, sir, paraphrasing what Lincoln said, this decision upon the “yellow dog” contract is an “astonisher,” and I “go for reversing it.” I go for reversing it, as Mr. Lincoln said, in any fashion by which I may voice that endeavor to reverse; and here comes an opportunity finally for us, in the Senate of the United States, to voice our views upon this inhuman, this cruel, and this wicked contract that rests upon the necessity of human beings and the hunger of innocent and helpless children.

Mr. President, there is in English practice and jurisprudence little or no use of the injunction in labor disputes. We ape the English in some things. We follow them in others. They have blazed the trail in jurisprudence for us. Why not follow them in this that they do in behalf of humanity and in behalf of human association and human activities?

Through the ages, sir, has gone on the long contest for human rights, with ever a little progress. Retrogression alone has come in this country with the injunction’s use. A few have ever sought control of the many for the few’s profit. I re-echo the words which Rumbold spoke upon the scaffold as he paid with his life his rebellion against James Stuart. The drums were beaten to drown from the populace his voice, but rolling down the centuries has come this sentence:

I never will believe that Providence has sent a few men into the world ready, booted and spurred, to ride, and millions ready, saddled and bridled, to be ridden.

I never will believe that and neither directly nor indirectly to such a philosophy can I give my consent. Because of the attitude of Judge Parker in the Red Jacket case, because, among many other things, for the reasons I have given, I could not vote on this occasion or any other for his confirmation as a Supreme Court judge.



## HON. KENNETH MCKELLAR, SENATOR FROM TENNESSEE

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I voted for the Clayton Anti-trust Act, by which the Congress intended to correct, among other things, the holding of the majority of the Supreme Court that injunctions should be generously awarded in labor cases, even to upholding the "yellow dog" contract. The court itself has always been divided on that question; it is still divided on it; the issue remains a live one in America. To put Judge Parker on the Supreme Court now would make our task of correcting this injustice but the harder. The "yellow dog" contract is unconscionable, and it is doubtful if any court should have ever upheld it. In order to vote for Judge Parker's confirmation I would have to vote to reverse my former position on the question of the issue of injunctions in labor cases.

Mr. President, I want to call the attention of the Senate to Section 20 of the act known as the Clayton Anti-trust Act:

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employes, or between employers and employes, or between employes, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

I call especial attention to this language:

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

### CLAYTON ACT MADE NUGATORY

Mr. President, when that law was passed in 1914 by an overwhelming majority, as I remember, on both sides of the House of Representatives, of which I was then a member, and also by an overwhelming majority in the Senate, the Congress believed in the principles that were there laid down. What happened to them? I believe the first time the question came before the court was in the Duplex Printing Co. against Deering, in Two hundred and fifty-fourth United States Reports. At that time the act was not declared unconstitutional, but was virtually emasculated.

Mr. President, to my mind, the principles enunciated in that act were so fair and so just to the employes and to the employers alike that it ought to have been upheld in toto; but, as has been stated here, it was chiseled down, and a great many people think that it was held unconstitutional. It was not held unconstitutional, but under such judges as Judge Parker it has virtually been made nugatory, and he made it nugatory in the Red Jacket case and, to my mind, without any warrant.

I wish to speak for a moment regarding the three cases which are of prime importance in this controversy. From the Hitchman case I want to read the words of the injunction.

In that case the defendants were enjoined—

From interfering or attempting to interfere with plaintiff's employes so as knowingly and willfully to bring about the breaking by plaintiff's employes, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and willfully enticing such employes, present or future, to leave plaintiff's service without plaintiff's consent.

Judge Parker upheld an injunction restraining the defendants—I quote the words of the injunction—

From inciting, inducing, or persuading the employes of plaintiffs to break their contract of employment with the plaintiffs—

Going, as will readily be seen from the language used, far beyond the terms of the injunction which was issued in the Hitchman case.

Judge Parker cited the Hitchman case in his opinion and said—and I again quote from his decision—that the Supreme Court in that case—

Also enjoined interference with the contract by means of peaceful persuasion. The doctrine of that case has been approved by the Supreme Court in later cases of American Steel Foundries vs. the Tri-City Central Trades Council, 257 U. S. 184.

### TRI-CITY OPINION IGNORED

Of course, Mr. President, his decision shows that Judge Parker had read, or he is supposed to have read, the Tri-City Central Trades Council case, in which case Chief Justice Taft delivered the opinion of the court. I want to show how utterly at variance the decision of Chief Justice Taft in that case is with the opinion of Judge Parker in the Red Jacket case. There is not the remotest connection between the principles enunciated by the Chief Justice of the United States Supreme Court, Mr. Taft, and the principles announced in the Red Jacket case. I quote from Chief Justice Taft's opinion as follows:

Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation.

A single employe was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. \* \* \* It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious. \* \* \* The elements essential



to sustain actions for persuading employes to leave an employer are first, the malice or absence of lawful excuse, and, second, the actual injury. (*American Foundries vs. Tri-City Council*, 257 U. S. 209, 210.)

That is read from Mr. Taft's opinion in a later case that Judge Parker cited, and did not follow; and yet he tries to put the blame, if any blame there be, for his decision upon the Supreme Court. As I said before, I should have had a great deal more admiration for him and a great deal more respect for him if he had boldly said, "I believed that that opinion was right; I believed it was the law, and I stand by it." He does not say anything like that, however. He excuses it in his letter of last Monday.

The statement by Mr. Taft says:

The principle followed in the *Hitchman* case can not be invoked here.

And, after describing what that case held, Judge Taft further said:

This court held that the purpose (in the *Hitchman* case) was not lawful, and that the means were not lawful, and that the defendants were thus engaged in an unlawful conspiracy which should be enjoined. The unlawful and deceitful means used were quite enough to sustain the decision of the court without more.

Mr. President, it will thus be seen that if Judge Parker had simply followed the ruling of the Supreme Court he would have followed the *Tri-City Trade Council* case, and he would not have followed the *Hitchman* case. Why? Because the *Hitchman* case was decided in 1917. The *Tri-City* case was decided in 1925. It was the latest enunciation from the Supreme Court on that subject; and if Judge Parker had just been following the Supreme Court decision, of course he should have followed the last decision.

Judge Parker enjoined interference with the contract by means of lawful persuasion, when the last case of the Supreme Court, then before him, plainly held that this could not be done. So, in his present position, Judge Parker is in this dilemma: He must of necessity stand on his decision as right under the holding of the Supreme Court in the *Hitchman* case, or he must admit that he did not understand the differentiation of that case as made by Chief Justice Taft, or that he did not follow the latest decision of the Supreme Court, but elected to follow a prior one.

The truth is, in my opinion, that Judge Parker believed that the law as laid down by the Supreme Court in the *Hitchman* case was right, and so strongly did he believe it that he extended it by making the injunction apply to interference with the contract by peaceful persuasion; and he did this without regard to the expressed opinion of an almost unanimous decision of the Supreme Court, delivered by Chief Justice Taft in the *Tri-City Trade Council* case.

In order that lawyers may examine these three cases which I think are conclusive against Judge Parker, I will give the style and dates of the cases:

*Hitchman Coal & Coke Co. vs. Mitchell* (245 U. S. 229), decided at the October term of court, 1917, with Justices Brandeis, Holmes and Clarke dissenting.

*American Foundries vs. Tri-City Council* (257 U. S. 184), decided at the October term of court, 1921, in an opinion by Mr. Chief Justice Taft, with only Mr. Justice Clarke dissenting.

*International Organization, etc., vs. Red Jacket C. C. & C. Co.* (18 Fed. Rept. 839), decided by Judge Parker on April 18, 1927.

## LAW NOT A FINALITY

Mr. President, while I wholly disagree with the opinion of Mr. Justice Sutherland in the case of United Railways & Electric Co. against West, decided on January 6, 1930, I desire here to call attention to Mr. Justice Sutherland's reasoning in that case as to how decisions of the Supreme Court should be followed. I quote from his opinion:

What is a fair return on property donated to a public purpose within this principle can not be settled by invoking decisions of this court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present-day conditions. Annual returns upon capital and enterprise, like wages of employes, cost of maintenance, and related expenses, have materially increased the country over. This is common knowledge. A rate of return upon capital invested in street railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future.

As I said, I do not agree with the result of the decision in that case, but I do commend the reasoning of Mr. Justice Sutherland that lawsuits should all be settled upon present-day conditions, and that a judge should be wholly independent, and should pass upon every case under present conditions, looking to the present and to the future rather than to the musty conditions of the past.

In the same way, perhaps to a greater extent, have conditions recently changed in regard to labor laws. A few years ago labor was a commodity. The status of labor was abolished by the Congress. A few years ago there was no collective bargaining. Now, according to Mr. Chief Justice Taft, the right to combine for such a lawful purpose has not been denied by any court for many years. Collective bargaining is no longer a theory, but it is a principle acquiesced in by substantially all fair-minded men.

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Kenneth McKellar—Congressional Record, April 30, 1930; pages 8341-8347.



## HON. HENRIK SHIPSTEAD, SENATOR FROM MINNESOTA

I want to say in the beginning that whatever accusations may be made about criticisms of the judiciary I hold to the belief that not only the Supreme Court of the United States but inferior courts as well can not lose any of their dignity or integrity except by their own acts. That applies not only to the Supreme Court of the United States but it applies equally as well to the legislative body and to the Executive.

I believe it is claimed that Hegel at one time said that humanity can not learn from history anything except that it can not learn from history. It has been customary at all times in human history that those who are concerned with the good or ill of humanity have gone back to the scrap piles, to the dump heaps of the past, very often, and taken an old discarded tin can in the form of an idea, given it a coat of paint and a nice label, and sold it to humanity as a container containing a hitherto unknown but benign cure for political and economic ills. Russia has such a tin can and it is labeled "communism." Italy has such a tin can and it is labeled "fascism." We have such a tin can and we call it "equity." All of these are repudiations of parliamentary government or government by law. Equity is covered with the mantle of the judiciary, and that mantle serves a dual purpose. It gives it a benign respectability and serves as a cover under which is concealed the sword which we call the power of injunction. This sword has been used by those to whom it has been intrusted. Its use could only be at the discretion of the judge sitting on the bench, and it has been used by many of those to whom it has been intrusted to nullify not only provisions of the Constitution but also the law of the land.

Associate Justice Holmes tells us in a volume called "A Collection of Early Legal Papers" that we got it with the common law from England. He tells us that England got it from the Germans and the Franks through the Normans, and the Germans and the French got it from the Roman Empire. When the Normans came to Normandy they met the Roman system of law traveling from the East to the West, a system of law that was formed for the purpose of making it possible for a few men to own all the wealth, free to live in perfect security in a land where most of the people were slaves. The Normans found it very useful. They adopted it and carried it to England with their arms and used it with their arms to dispossess the Saxons and the Celts of their property, as judges of the courts of equity are using it now to deprive American citizens of their liberties.

Through the royal prerogative of the King, as it was known, covered by the ermine of the King, this power was abused until the House of Commons gradually, through several hundred years of effort, curbed the use of that power. I want to read from a footnote found in this volume by Justice Holmes a short extract:

The object of the repeated prayers of the commons from Richard II to Henry VI

directed against the council and the chancellor was that common-law cases should be tried in the regular courts.

Under the constant hammering of the Commons, courts of equity became divested of progressively more and more power in England until Lord Chancellor Ellsmere, who served under Queen Elizabeth, said, in describing his court and its functions:

It is the refuge of the poor and afflicted. It is the altar and sanctuary for such as against the might of rich men and the countenance of great men can not maintain the goodness of their cause and the truth of their title.

It became the basic principles of British chancery or equity courts that "it was to be exercised for the protection of property rights only."

"He who would seek its aid must come with clean hands."

"There must be no adequate remedy at law."

"It must not be used to punish crime."

"It must never be used to curtail personal rights."

After this power was curbed by Great Britain it came with the common law to the United States. Equity as then known came to the United States. It was not used in controversies between capital and labor until 1888, and it was not until the early nineties that a Federal judge found that his conscience permitted him to use the sword of the injunction with which to deprive American citizens of the liberty guaranteed them under the first amendment to the Constitution. It has been said that in order to enforce the provisions of the fifth amendment to protect property, in order to furnish an adequate remedy at law, this power must be used, because under its use a judge can deprive American citizens of their constitutional rights, the right of free speech, the right of peaceful assemblage, and the right to a free press.

I can not believe that due process of law as understood in the fifth amendment includes the nullification of any other provision of the Constitution. I believe the first amendment or any other amendment or any other provision of the Constitution is as sacred as the fifth amendment. In fact, I believe that every provision of the Constitution, including the fifth amendment, rests upon the sacred protection of the first amendment. Let the legislature, the executive, or the judiciary permit a progressively frequent violation of the first amendment and there will be created a condition that will throw the fifth amendment and other provisions of the Constitution overboard. Permit the constant violation of provisions and the guaranties embodied in the first amendment and trial by jury and there will be created a condition that will destroy the entire Constitution.

I want to read a statement by Judge Henry Caldwell, at one time presiding judge of the circuit court of appeals of the eighth circuit, who said in an address before the Missouri State Bar Association, explaining what courts of equity had become in recent years. I ask Senators to compare it with the definition of the court given by the distinguished English jurist quoted by Mr. Justice Holmes, and with Webster's International Dictionary definition of equity, and definition of equity in Bouvier's Dictionary of Law, where it is called a court of conscience. Judge Caldwell said:

The modern writ of injunction is used for purposes which bear no more resemblance to the uses of the ancient writ of that name than the milky way bears to the sun. Formerly it was used to conserve the property in dispute between private litigants, but in modern times it has taken the place of the police powers of the State and nation. It enforces and restrains with equal facility the criminal laws



of the State and nation. With it the judge not only restrains and punishes the commission of crimes defined by statute but he proceeds to frame a criminal code of his own, as extended as he sees proper, by which various acts, innocent in law and morals, are made criminal; such as standing, walking, or marching on the public highway, or talking, speaking, or preaching, or other like acts. In proceedings for contempt for an alleged violation of the injunction the judge is the lawmaker, the injured party, the prosecutor, the judge, and the jury. It is not surprising that uniting in himself all these characters he is commonly able to obtain a conviction.

The extent and use of this powerful writ finds its only limitation in an unknown quantity called judicial discretion, touching which Lord Camden said: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst it is every crime, folly, and passion to which human nature is liable."

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Henrik Shipstead—Congressional Record, May 7, 1930; pages 8790-8791.





